Supreme Court, U.S.
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No. 00-529

In The
Supreme Court of the United States

Medical Management Sciences, Inc.,
Petitioner,

v.

Medical Billing, Inc. and
Reich, Seidelmann & Janicki,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DANIEL L. BROCKETT
Counsel of Record

ROBIN G. WEAVER
MICAH D. GREEN
ADAM R. FOX
SQUIRE, SANDERS & DEMPSEY, L.L.P.
4900 KEY TOWER
127 PUBLIC SQUARE
CLEVELAND, OH 44114-1304
(216) 479-8500
Counsel for Petitioner

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QUESTION PRESENTED

Does a federal court violate a party's Seventh Amendment right of trial by jury when it vacates a jury verdict and grants judgment as a matter of law for the verdict-loser on grounds that were not raised in either a pre-verdict motion under Fed. R. Civ. P. 50(a) or a post-verdict motion under Fed. R. Civ. P. 50(b), and were not otherwise brought to the attention of the district court at any time during trial?

PARTIES TO THE PROCEEDINGS

Petitioner

Petitioner Medical Management Sciences, Inc. has been merged with and into PST Services, Inc., which is a subsidiary of Per Se Technologies, Inc. PST Services, Inc. has no subsidiaries.

Respondents

Medical Billing, Inc. and Reich, Seidelmann & Janicki.

Other Parties

James F. Thacker and William J. DeZonia, Jr., both former executives of Medical Management Sciences, Inc., were parties to the proceedings below and have no interest in the outcome of the petition.

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Medical Management Sciences, Inc. ("MMS") respectfully requests that this Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals on the merits is reported at 212 F.3d 332 (6th Cir. 1999), and is reproduced in App. A at 1a-23a.* The opinion and order of the United States District Court for the Northern District of Ohio is unreported and is reproduced in App. B at 24a-102a. The decision of the court of appeals denying the petition for rehearing *en banc* is unreported and is reproduced in App. C at 103a-104a.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was issued on May 8, 2000, and its judgment was revised prior to publication on May 19, 2000. A timely petition for rehearing and suggestion for rehearing *en banc* was denied by that court on July 7, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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* The opinion reported at 212 F.3d 332 (6th Cir. 1999) differs from the one reported in App. A to the extent that it reflects the corrections noted in the May 19, 2000 letter from the court of appeals, which is reproduced in App. D at 105a-108a.

CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment to the United States Constitution provides, among other things, that "the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

STATEMENT OF THE CASE

This case arises from a contract dispute between an Ohio-based radiology group and its outside billing company, petitioner MMS. For six full weeks in the fall of 1996, the case was tried to a federal jury sitting in the United States District Court for the Northern District of Ohio. On the central question presented -- how the billing contract at issue was to be interpreted -- the jury found in favor of petitioner and against the physician group. The jury awarded petitioner $1.8 million in compensatory damages, representing a return to petitioner of certain "up-front" money that petitioner had paid to the radiologists at the outset of the billing relationship for the right to bill the radiologists' patients at a premium rate for a fixed number of years.

Post-verdict motions remained pending for over a year, when the district court issued a memorandum opinion and order vacating the jury's central finding. While acknowledging that the evidence was sufficient to support the jury's verdict, the district court sua sponte embarked upon a lengthy analysis as to whether grounds existed to vacate that award -- even though neither party had raised these grounds in pre- or post-verdict motions. The district court ultimately granted judgment as a matter of law in favor of the physician

group on grounds not raised in either a pre-verdict motion under Fed. R. Civ. P. 50(a) or a post-verdict motion under Fed. R. Civ. P. 50(b).

Petitioner appealed, claiming that the district court had failed to follow the explicit requirements of Rule 50 and had denied petitioner its Seventh Amendment right of trial by jury. Even though petitioner featured this argument as its primary assignment of error, the court of appeals never addressed it, and instead affirmed the grant of judgment as a matter of law on alternative grounds also not raised at trial. The net effect of the court of appeals decision was to nullify a unanimous jury verdict in favor of petitioner on grounds not raised by the verdict-loser either prior to or after submission of the case to the jury.

A. The Seventh Amendment And Fed. R. Civ. P. 50

As adopted, the right secured by the Seventh Amendment does not ensure that all civil disputes will be resolved by jury verdict. Nevertheless, it is a right that, by its express terms, insulates a jury verdict from judicial intervention except in the narrow instances permitted by the common law. See Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501 (1959) ("Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.").

For many years, compliance with the Seventh Amendment was a process addressed solely by the courts. See, e.g., Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 659-61 (1935); Slocum v. New York, 228 U.S.

364, 375-400 (1913). When the Federal Rules of Civil Procedure were adopted, however, Congress effectively codified the common law practice observed in Redman, of reserving at trial questions of law for post-verdict consideration. See Fed. R. Civ. P. 50, Advisory Committee Note to Subdivision (b) (1937), reprinted in 12A Charles Alan Wright et al., Federal Practice and Procedure, App. C at 504 (2000).

Federal trial courts were thus empowered to revisit post-verdict any issue reserved at trial by a pre-verdict motion under Federal Rule of Civil Procedure 50, and to alter the judgment of the jury in the appropriate circumstances. See Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 250 (1940); see also Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 321-22 (1967) (holding that an appellate court may enter judgment notwithstanding the verdict consistent with the Seventh Amendment); Galloway v. United States, 319 U.S. 372, 384-390 (1943) (holding a directed verdict at trial on a pre-verdict motion consistent with the Seventh Amendment).

Constitutional integrity was assured by the federal judiciary's strict compliance with the dictates of Rule 50. Under this approach, the federal courts interpreted Rule 50 to mean what it says -- that a motion for judgment as a matter of law following a jury verdict could be granted only on a basis specifically advanced in a pre-verdict motion under Rule 50(a). See, e.g., Bonjorno v. Kaiser Aluminum & Chem. Corp., 752 F.2d 802, 814 (3d Cir. 1985) (noting the importance of compliance to the "seventh amendment rights" of the "non-moving party"). In that way, a litigant would have an adequate opportunity to respond and correct any potential defect in its case. See id. ("The requirement that the specific issue be raised first in the motion for directed verdict, before the issue is submitted to the jury, affords the

non-moving party an opportunity to reopen its case and present additional evidence.").

Over the years, however, an increasing number of federal appellate courts came to ignore these constitutional concerns. Rather than requiring strict compliance with Rule 50, they viewed a pre-verdict motion under Rule 50(a) as a "procedural technicality" that could be ignored. See, e.g., Gutzwiller v. Fenik, 860 F.2d 1317, 1330-31 (6th Cir. 1988); Trujillo v. Goodman, 825 F.2d 1453, 1456 (10th Cir. 1987); Federal Sav. and Loan Ins. Corp. v. Reeves, 816 F.2d 130, 137-38 (4th Cir. 1987); Benson v. Allphin, 786 F.2d 268, 273-74 (7th Cir. 1986) (so holding despite its acknowledgment that "the text of Rule 50(b) admits no exceptions"); Farley Transp. Co. v. Santa Fe Trail Transp. Co., 786 F.2d 1342, 1347 (9th Cir. 1985) (collecting cases); Ebker v. Tan Jay Int'l, Ltd., 739 F.2d 812, 823 (2d Cir. 1984); Halsell v. Kimberly-Clark Corp., 683 F.2d 285, 295 (8th Cir. 1982); Beaumont v. Morgan, 427 F.2d 667, 670 (1st Cir. 1970).

These rulings prompted serious concerns about the constitutionality of Rule 50 practice. See, e.g., McLaughlin v. Fellows Gear Shaper Co., 786 F.2d 592, 601 (3d Cir. 1986) (Adams, Circuit Judge, dissenting) (criticizing the panel majority in that case for disregarding "the clear-cut requirement stated in Federal Rule of Civil Procedure 50(b) . . . that a grant of judgment n.o.v. must be preceded by a motion for directed verdict specifically identifying the ground upon which judgment n.o.v. is requested," and cautioning that "the rule has constitutional underpinnings in the Seventh Amendment's guarantee that 'no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law'").

In response to the growing disharmony, the Federal Rules of Civil Procedure were amended in 1991, and Rule 50 was changed to "to avoid any question arising under the Seventh Amendment." Fed. R. Civ. P. 50, Advisory Committee Note to Subdivision (b) (1991), reprinted in Civil Rule of Procedure Amendments, 134 F.R.D. 525, 687. Although the substance of Rule 50 was not altered, its text was clarified to foreclose any "end-run around the Rule." EEOC v. AIC Security Investigations, Ltd., 55 F.3d 1276, 1286 (7th Cir. 1995). Specifically, the rule was revised to spell out that "the post-verdict motion is a renewal of an earlier motion made at the close of the evidence," and that "a post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion." Fed. R. Civ. P. 50, Advisory Committee Note to Subdivision (b) (1991), reprinted in Civil Rule of Procedure Amendments, 134 F.R.D. 525, 687.

Despite this proactive step by Congress, and its approval by this Court, several of the courts of appeals have continued to ignore the express mandate of Rule 50. See, e.g., Tamez v. City of San Marcos, 118 F.3d 1085, 1089-91 (5th Cir. 1997); Pulla v. Amoco Oil Co., 72 F.3d 648, 655 (8th Cir. 1995); Singer v. Dungan, 45 F.3d 823, 828-29 (4th Cir. 1995). Others, in contrast, have observed that the 1991 amendments foreclosed the practice of making an "end-run around the Rule." AIC Security Investigations, 55 F.3d at 1286; see also Whelan v. Abell, 48 F.3d 1247, 1251 (D.C. Cir. 1995) (holding that the "new language . . . works to 'alter the result' in cases where a court . . . effectively circumvented the requirement that the later motion be based on grounds raised . . . earlier").

The Sixth Circuit's decision in this case increases an existing disorder in the federal circuit courts of appeals about

compliance with Rule 50. At the district court and even appellate level, conflicting decisions are proliferating rapidly, even among appellate panels within circuits. The need for guidance from this Court is acute. The question presented is whether a federal court may set aside a jury verdict and enter judgment for a verdict-loser on grounds that were not raised at trial, pursuant to Rule 50 or otherwise. The question is important, for it goes to the heart of fairness in civil litigation -- the limited circumstances in which a jury verdict may be overturned.

B. The Proceedings Below

Respondent Reich, Seidelmann & Janicki ("RS&J") is a large radiology practice that contracts with hospitals and other healthcare providers to provide radiology services to patients. Prior to 1992, RS&J handled its own billing procedures through an affiliate company, respondent Medical Billing, Inc. ("MBI"), which was owned by two of the three doctors who owned RS&J. In early 1992, RS&J determined to outsource its billing and (through MBI) contracted with petitioner MMS, then a nationwide physician services company specializing in billing and practice management for radiology groups.

The parties entered into three separate but related contracts under which MMS was appointed as the "exclusive billing agent" for RS&J for a period of six years. The dispute arose when respondents terminated the billing contract before its first anniversary and sought to keep the $2.7 million "up-front" money that MMS had paid at the beginning of the billing relationship.

In August 1994, respondents sued petitioner, making various allegations not relevant to this petition. MMS

counterclaimed, asserting among other things that respondents had breached an agreement between the parties, entitling MMS to a return of the "unearned" portion of the $2.7 million up-front cash payment it had made for the right to bill RS&J's clients at an above-market rate for a fixed period of time. (App. A, at 6a; App. B at 34a).

Prior to trial, respondents moved for summary judgment claiming that the dispute over the $2.7 million could be resolved on the basis of the four corners of the relevant agreements. The district court denied this motion, finding "overwhelming ambiguities" in the operative documents and ruling that parol evidence was necessary to ascertain the parties' intent. The court directed that trial proceed to resolve, among other things, genuine issues of fact that existed over what the parties actually intended.

The case was tried for six weeks in the fall of 1996. Without objection, both parties were permitted to introduce a substantial body of extrinsic evidence, including parol testimony of the participants who negotiated the deal, prior and contemporaneous written statements and correspondence, and evidence of the parties' course of performance. At the close of the evidence, respondents moved for judgment as a matter if law under Rule 50(a) on certain limited issues, but did not seek judgment against petitioner's counterclaim on grounds that parol evidence had been improperly admitted. That issue was suggested by MBI only in its pretrial motion for summary judgment, rejected by the district court, and then dropped altogether at trial.

As a consequence, the counterclaim for return of the $2.7 million went to the jury without so much as a hint -- from respondents or the district court -- that the record contained inadmissible parol testimony. Even after the

verdict was announced, respondents did not challenge the $1.8 million award to petitioner on parol evidence grounds; it instead moved for post-verdict relief on other grounds. The parol evidence issue did not surface until 15 months later when the district court sua sponte used it as a basis to nullify the jury's verdict for MMS.

In granting judgment as a matter of law to respondents, the district court on its own raised the question as to whether parol evidence was properly admitted at trial. The district court then proceeded to conclude, without any briefing by the parties, that most of the extrinsic evidence admitted at trial should never have been heard by the jury--the completely opposite ruling to the one the court had made on summary judgment when presented with the identical contracts.

In the district court's view, the only "admissible" extrinsic evidence was the post-agreement course of conduct which, when considered with the contracts themselves, clarified (again from the district court's perspective) ambiguities existing in the written documents. (App. A at 6a; App. B at 63a, 73a-81a). By this reasoning, the same contracts found to contain "overwhelming ambiguities" when the court denied summary judgment became clear as a mountain stream on post-verdict motions.

On appeal to the Sixth Circuit, MMS urged reinstatement of the jury's verdict because the district court had granted a post-verdict judgment on a ground that was not properly preserved under Federal Rule of Civil Procedure 50(a) -- or for that matter, even advanced in a Rule 50(b) motion. (App. A at 9a). On May 8, 2000, a divided panel of the Sixth Circuit issued an opinion in which it accurately identified as MMS's primary argument on appeal that "the

district court erred by considering grounds for relief under Rule 50(b) that were not raised in an earlier motion under Rule 50(a)." (App. A at 9a).

However, nowhere in its opinion did the panel majority address that assignment of error. (App. A at 10a-11a; App. D at 105a-108a) (affirming the district court without addressing its procedural default). Instead, the panel majority proceeded to address the so-called "four corners" argument that respondents had dropped altogether at trial, but raised on appeal after the district court had seized upon the related parol evidence issue as a basis to nullify the jury's verdict for MMS.

The upshot of both the district court's opinion and the court of appeals decision is that the jury's verdict in favor of petitioner was reversed on a ground that was never advanced at trial or even raised by the parties on post-verdict motions. The question raised here is whether a federal court may, consistent with the Seventh Amendment, re-examine a unanimous jury verdict on legal grounds not preserved by the verdict-loser prior to submission of the case to the jury.

REASONS FOR GRANTING THE WRIT

I. There Is A Conflict Among The Circuits Concerning The Proper Interpretation Of Federal Rule 50

As noted above, to correct lackadaisical Rule 50 practice in the federal courts of appeals, Congress amended the rule in 1991:

> The revision [to Rule 50] alters the result in cases in which courts have used various techniques to avoid the requirement that a motion for a directed verdict be made as a predicate to a motion for judgment notwithstanding the verdict.

Fed. R. Civ. P. 50, Advisory Committee Note to Subdivision (a) (1991), reprinted in Civil Rule of Procedure Amendments, 134 F.R.D. 525, 686; see id. at 685 ("In no event . . . should the court enter judgment against a party who has not been apprised of the materiality of the dispositive fact and been afforded an opportunity to present any available evidence bearing on that fact.").

For a brief time, it seemed as though the courts would uniformly construe Rule 50 to mean what it says -- a party is barred from obtaining a post-verdict judgment as a matter of law on a ground that it did not advance in a timely filed pre-verdict motion. See, e.g., United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd., 210 F.3d 1207, 1228 (10th Cir. 2000) petition for cert. filed, 69 U.S.L.W. 3175 (U.S. Sept. 5, 2000) (No. 00-347); Hopp v. City of Pittsburgh, 194 F.3d 434, 440 (3d Cir. 1999); United States ex rel. Wallace v. Flintco Inc., 143 F.3d 955, 960 (5th Cir. 1998); Browning v. President Riverboat Casino-Missouri, Inc., 139 F.3d 631, 635-36 (8th Cir. 1998); Robles-Vasquez v. Garcia, 110 F.3d 204, 206 (1st Cir. 1997); American & Foreign Ins. Co. v. Bolt, 106 F.3d 155, 159 (6th Cir. 1997) ("[A]llowing a judge to sua sponte raise a new issue post-verdict, and proceed to overturn a jury verdict on that basis contravenes the dictates of Rule 50(b)."); Price v. City of Charlotte, 93 F.3d 1241, 1248-49 (4th Cir. 1996); Holmes v. United States, 85 F.3d 956, 963 (2d Cir. 1996); Hoechst Celanese Corp. v. BP Chemicals Ltd.,78 F.3d 1575, 1582 (Fed. Cir. 1996); AIC

Security Investigations, 55 F.3d at 1286 (Seventh Circuit); Whelan, 48 F.3d at 1251 (D.C. Circuit); Redd v. Phenix City, 934 F.2d 1211, 1214 (11th Cir. 1991); see also Lifshitz v. Walter Drake & Sons, Inc., 806 F.2d 1426, 1429 (9th Cir. 1986).

However, several federal courts of appeals have actually continued their practice of taking "an indulgent view as to what constitutes a sufficient predicate for a Rule 50(b) motion." Singer, 45 F.3d at 828-29 (Fourth Circuit embracing that position); see also Browning, 139 F.3d at 636 (Eighth Circuit rejecting "technical precision" to address an argument not preserved under Rule 50, despite noting the procedural mandate); Polanco v. City of Austin, 78 F.3d 968, 974 (5th Cir. 1996) (citing pre-amendment cases to reject "slavish adherence to the procedur[e]" admittedly mandated by Rule 50); Simon v. Navon, 71 F.3d 9, 14 n.3 (1st Cir. 1995) (approving of a "modest departure from the formal procedures" of Rule 50).

And several have done so, like the court below, specifically to address issues lost on summary judgment -- and not preserved by Rule 50 -- after a full trial and jury verdict on the merits. See, e.g., Cochran v. City of Los Angeles, 222 F.3d 1195, ___ (9th Cir. 2000); Aerotronics, Inc. v. Pneumo Abex Corp., 62 F.3d 1053, 1057, 1059 (8th Cir. 1995); Penbarr Corp. v. Insurance Co. of N. Am., 976 F.2d 145, 149 (3d Cir. 1992).

Others, in contrast, have held that Rule 50 compliance is required to preserve an issue raised and lost on a motion for summary judgment. See, e.g., Pahuta v. Massey Ferguson, Inc., 170 F.3d 125, 131 (2d Cir. 1999); Chesapeake Paper Prod. Co. v. Stone & Webster Eng'g Corp., 51 F.3d 1229,

1235-37 (4th Cir. 1995); cf. Holley v. Northrop Worldwide Aircraft Servs., Inc., 835 F.2d 1375, 1377 (11th Cir. 1988) ("Summary judgment was not intended to be a bomb planted within the litigation at its early stages and exploded on appeal . . . .").

This conflict is unusual in that some circuits appear to embrace the mandatory language of Rule 50, but unpredictably depart from it on a case-by-case basis. For example, the Ninth Circuit panel in Cochran held that an "appellant's failure to renew post-verdict the motion for judgment as a matter of law made at the close of evidence does not prevent our review and reversal in favor of appellant." 222 F.3d at ___. In support of this rationale, the court noted that the disputed issue was purely legal, and did not "concern the sufficiency of the evidence." Id. Earlier this year, however, a different Ninth Circuit panel refused to address, after a jury trial, an appellant's purely legal qualified immunity claim that was lost on summary judgment and then dropped altogether at trial. See Price v. Kramer, 200 F.3d 1237, 1244 (9th Cir. 2000) (noting that the appellants did not exercise any of their "multiple opportunities" to preserve the issue for consideration after judgment), cert. denied, ___ U.S.L.W. ___ (U.S. Oct. 2, 2000) (No. 99-1881).

Eighth Circuit precedent is similarly confusing. As noted above, the panel in Aerotronics ignored the requirements of Rule 50 in order to consider an issue lost on summary judgment. Later, in Metropolitan Life Ins. Co. v. Golden Triangle, 121 F.3d 351 (8th Cir. 1997), a different panel attempted to distance itself from this casual Rule 50 practice by observing that "the panel [in Aerotronics] reviewed the denied [summary judgment] motion without reaching the question of whether its review was proper." Id.

at 354. In defining its power to engage in such review, the Metropolitan Life panel rejected a "proposed dichotomy, between a summary judgment denied on factual grounds and one denied on legal grounds," id. at 355, and accordingly refused to address an issue of contract interpretation because the appellant "never renewed the argument it set forth in its summary judgment motion by moving for judgment as a matter of law." Id. at 353; see also id. at 356 (holding that to do so would "condone[] a litigation strategy that disregards the Federal Rules of Civil Procedure 50(a) and 50(b)"). Later, however, the panel in White Consolidated Indus. Inc. v. McGill Mfg. Co., 165 F.3d 1185 (8th Cir. 1999), reached the exact opposite conclusion. See id. at 1190 (approving of the distinction between legal and factual issues raised on summary judgment, and addressing an issue of contract interpretation not preserved by Rule 50 at trial).

The mixed results extend to the Fourth Circuit as well. Prior to the 1991 amendment to Rule 50, a panel of the Fourth Circuit reviewed an issue lost on summary judgment that was not preserved for post-verdict consideration under Rule 50. See Orlandi v. Goodell, 760 F.2d 78, 80 (4th Cir. 1985). After the amendment to Rule 50 was made, another panel expressed its continued adherence to the "indulgent view as to what constitutes a sufficient predicate for a Rule 50(b) motion." Singer, 45 F.3d at 828-29. Only recently has still another panel criticized Orlandi for not taking "special notice of the fact that it was reviewing the district court's pretrial summary judgment decision after a full trial on the merits." Chesapeake Paper, 51 F.3d at 1234. In so doing, that panel articulated the same logic adopted in Metropolitan Life, rejecting as artificial any distinction between legal and evidentiary issues on summary judgment, and refusing to reexamine an issue of contract interpretation rejected on

summary judgment and dropped altogether at trial. Id. at 1234-37.

The legal morass observed in these conflicting decisions among (and within) the circuits is compounded because none of them has set a clear precedent to guide the district court bench, the bar, or the public. No federal appellate panel within one circuit can reverse the decision of another panel in the same circuit, unless it is sitting *en banc*. See, e.g., Brown v. First Nat'l Bank, 844 F.2d 580, 582 (8th Cir. 1988); United States v. Guglielmi, 819 F.2d 451, 457 (4th Cir. 1987); United States v.Guglielmini, 598 F.2d 1149, 1152 (9th Cir. 1979). With the present case, the Sixth Circuit only adds to the confusion. Compare App. A at 9a-11a (failing even to address an assignment of error identifying noncompliance with Rule 50), with American & Foreign, 106 F.3d at 160 (observing the mandatory nature of Rule 50). Because the Sixth Circuit denied rehearing *en banc* of the instant case, see App. C at 103a-104a, guidance from this Court is imperative. See United States v. Smith, 73 F.3d 1414, 1418 (6th Cir. 1996) (holding, again, that only a panel sitting *en banc* can reverse another panel's holding). Indeed, the multi-faceted conflict exemplified by this case is suitable for certiorari jurisdiction for several reasons.

First, the steps a party must take to preserve an issue for post-verdict, including appellate, consideration are in utter disarray; yet they form the basis of an important and recurring issue -- the proper use of Rule 50. Indeed, the use and interplay of the procedural devices for obtaining judgment as a matter of law provided by Rules 50 and 56 have become widespread in federal civil cases. See Robert J. Gregory, One Too Many Rivers To Cross: Rule 50 Practice In The Modern Era Of Summary Judgment, 23 FLA. ST. U. L. REV. 689, 690-92 (1996).

There needs to be uniformity and consistency in the way that trial and appellate courts address motions seeking judgment as a matter of law. Yet, as noted, several of the federal circuit courts of appeals, like the Sixth Circuit below, appear to enforce or ignore Rule 50's procedural mandate case by case. See Browning, 139 F.3d at 636 (Eighth Circuit rejecting "technical precision" to address an argument not preserved under Rule 50, while recognizing its mandate); Polanco, 78 F.3d at 974 (Fifth Circuit rejecting "slavish adherence to the procedur[e]" admittedly mandated by Rule 50); Simon, 71 F.3d at 14 & n.3 (First Circuit speaking to "our own stringent adherence" to the Rule 50 procedural mandate, while simultaneously "depart[ing] from the formal procedures").

Second, the conflict is alive and growing. Rule 50 has already been revised once in the past decade specifically to "alter[] the result in cases in which courts have used various techniques to avoid the requirement that a motion for a directed verdict be made as a predicate to a motion for judgment notwithstanding the verdict." Fed. R. Civ. P. 50, Advisory Committee Note to Subdivision (a) (1991), reprinted in Civil Rule of Procedure Amendments, 134 F.R.D. 525, 686. Yet many appellate panels continue to follow their own pre-amendment precedent, viewing the rule as a procedural technicality that can be ignored when they see fit.

The time is thus ripe for this Court to exercise its supervisory role over the federal judiciary with respect to the proper interpretation of Rule 50. See Chesapeake Paper, 51 F.3d at 1235 n.7 (collecting several cases "contradict[ing] the holdings from other circuits" regarding the ability of appellate courts to address issues dropped after summary judgment has been denied); cf. McLaughlin, 786 F.2d at 604-605 (Adams, Circuit Judge, dissenting) ("We are not free to ignore these

rules which have been carefully drafted, and approved by the Supreme Court and the Congress after thorough consideration by the entire bar, merely because their enforcement may be perceived as producing an undesirable result in a particular case.").

II. The Question Presented Is Important

When Congress amended Rule 50 in 1991 to make clear that "[a] post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion," it observed that "[o]ne purpose of this concept was to avoid any question arising under the Seventh Amendment." Fed. R. Civ. P. 50, Advisory Committee Note to Subdivision (b) (1991), reprinted in Civil Rule of Procedure Amendments, 134 F.R.D. 525, 687; see also Acosta v. Honda Motor Co., 717 F.2d 828, 831 (3d Cir. 1983) (explaining that Rule 50 "is essentially a notice provision that, among other functions, protects the important seventh amendment right of trial by jury"). This Court has recently approved of this view. See Weisgram v. Marley Co., 528 U.S. 440, ___, 120 S. Ct. 1011, 1020 (2000) (noting the significance of compliance with Rule 50(a) so that a party "will have had notice, before the close of evidence, of the alleged evidentiary deficiency").

Because motions for judgment as a matter of law in jury trials are governed by Rule 50, ignoring the requirements of the rule may jeopardize a party's Seventh Amendment right. Several federal appellate panels have noted that a party's right to a jury verdict is too important to be stripped away without notice at trial. See Locricchio v. Legal Servs. Corp., 833 F.2d 1352, 1359 (9th Cir. 1987); see also Pahuta, 170 F.3d at 132; Metropolitan Life, 121 F.3d at 355-56; Watson v. Amedco Steel, Inc., 29 F.3d 274, 277 n.3 (7th

Cir. 1994); Whalen v. Unit Rig, Inc., 974 F.2d 1248, 1250-51 (10th Cir. 1992).

In denying petitioner its jury verdict on grounds not raised at trial, the Sixth Circuit is out of step not only with the clear mandate of Rule 50, but with the better-reasoned weight of judicial opinion in the federal courts. This Court should take this case to resolve the conflict among the circuits and to establish a uniform rule, consistent with the 1991 amendments to Rule 50 and the Seventh Amendment. Litigants in different parts of the country should not be subject to different standards concerning the circumstances in which courts may re-examine jury verdicts under Federal Rule 50.

III. The Decision Of The Court Of Appeals Is Erroneous

At its most fundamental level, the Sixth Circuit erred by failing even to pass on the issue central to MMS's appeal. See, e.g., In re Agent Orange Prod. Liability Litig., 818 F.2d 145, 148 (2d Cir. 1987) ("We are a court of law, and we must address and decide the issues raised as legal issues."). This constituted a gross miscarriage of justice, as the law demands the courts of appeals properly to dispose of all threshold procedural issues before proceeding to address underlying substantive claims. See North Carolina v. Rice, 404 U.S. 244, 245-46 (1971).

The fact that the court of appeals ignored the Rule 50 argument altogether in no way diminishes the ripeness of this controversy for certiorari review. Indeed, the method by which the panel elected to cloak its disregard for Rule 50 effects a subtle erosion of legal principle that is disproportionately harsh in impact. Unlike the verdict-winner in Weisgram v. Marley Co., 528 U.S. 440, 120 S. Ct. 1011

(2000), who similarly had a jury verdict set aside by a reviewing court, MMS never received the critically important "notice" that the court would consider, post-verdict, an issue capable of depriving it of the judgment. Id. at 1020; see Pahuta, 170 F.3d at 132; Chesapeake Paper, 51 F.3d at 1236; Acosta, 717 F.2d at 831.

This Court made clear in Weisgram that "[a]t the close of [the plaintiff's] evidence, and again at the close of all the evidence," the defendant had "unsuccessfully moved under Federal Rule of Civil Procedure 50(a)" on the same ground that eventually provided the basis for the verdict's reversal. 528 U.S. at ___, 120 S. Ct. at 1015. Indeed, the defendant "again requested judgment as a matter of law" post-verdict on the identical basis, and lodged objections "both before and during the trial" on this basis. Id. at ___, 1015, 1016. This Court noted that these steps imbued the record in Weisgram with "fairness" because the verdict-winner was thoroughly apprised of any defects in his case, which he therefore could have corrected before the case went to the jury. Id. at ___, 1020.

Here, in contrast, there was no notice at trial that the admission of the extrinsic evidence would later be disputed, and all parties participated in the introduction of extrinsic evidence regarding contract intent. Yet, a divided court below seized upon the alleged inadmissibility of this evidence to direct judgment in favor of the verdict-loser at trial. The ruling of the court below effectively "condone[d] a litigation strategy that disregards the Federal Rules of Civil Procedure 50(a) and 50(b)," and therefore runs afoul of the holdings in this Court and several of the courts of appeals. Metropolitan Life, 121 F.3d at 356.

Certiorari jurisdiction is warranted to correct this error and clarify the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/_____
Daniel L. Brockett
Counsel of Record
Robin G. Weaver
Micah D. Green
Adam R. Fox
SQUIRE, SANDERS & DEMPSEY
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114-1304
(216) 479-8500

Attorneys for Petitioner
Medical Management Sciences, Inc.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed May 8, 2000]

Nos. 98-3561/3564

MEDICAL BILLING, INC., *Plaintiff-Appellee*,	)
REICH, SEIDELMANN & JANICKI, *Plaintiff-Appellee/ Cross-Appellant*,	)
v.	)
MEDICAL MANAGEMENT SCIENCES, INC.; JAMES F. THACKER; WILLIAM J. DEZONIA, JR., *Defendants-Appellants/ Cross-Appellees.*	)

Appeal from the United States District Court for the Northern District of Ohio at Cleveland. No. 94-01567 Kathleen McDonald O'Malley, District Judge.

Before: MERRITT and SILER, Circuit Judges; BECKWITH, District Judge.*

BECKWITH, D. J., delivered the opinion of the court, in which SILER, J., joined. MERRITT, J. delivered a separate opinion concurring in part and dissenting in part.

OPINION

SANDRA S. BECKWITH, District Judge. Reich, Seidelmann & Janicki ("RS&J") is a radiology practice. Until September 1992, Medical Billing, Inc. ("MBI"), which is owned by Drs. Reich and Seidelmann, performed billing services for RS&J and two other small affiliated practices. In 1992, Medical Management Sciences, Inc. ("MMS") began soliciting RS&J's billing business. In September 1992, MBI and MMS entered into three agreements. The two of those agreements that are relevant to this appeal are the Billing Services Agreement and the Asset Purchase Agreement.

Pursuant to the Billing Services Agreement, MMS agreed to perform billing services for RS&J and the other medical practices formerly served by MBI. MBI agreed to pay MMS fifteen percent of the amounts it collected for services performed by RS&J. That percentage was well in excess of the market rate of 9.5%. MMS promised to

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* The Honorable Sandra S. Beckwith, United States District Judge for the Southern District of Ohio, sitting by designation.

perform billing and collection services and to remit payments received in a timely fashion.

Two other provisions of the Billing Services Agreement are of particular relevance here. MMS promised to pay MBI a volume bonus for amounts billed by RS&J in excess of their previous billings (hereinafter, the "Volume Bonus"). MMS also agreed to guarantee increased revenue collections and to pay MBI the difference between the amounts it guaranteed and the amounts it actually collected[1] (hereinafter, the "Collection Bonus").

Pursuant to the Asset Purchase Agreement, MMS agreed to pay MBI $2.7 million for its assets, which are described with particularity in Schedule 1 to the agreement. Then, in Schedule 9 to the Asset Purchase Agreement, the parties to the agreement allocated the purchase price as follows: $10,000 for certain used office furniture and $2.69 million for a "Covenant Not To Compete in any radiology billing services activity by MBI, its Shareholders, officers and other principals." The Covenant Not To Compete provision of the Asset Purchase Agreement provides as follows:

> Commencing on the Closing Date and ending on the expiration of the term or upon the termination for whatever reason of the Billing Services Agreement, seller, its shareholders and officers and other principals agree to not,

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[1] The calculation of revenue collected was to be performed on the basis of a unit described in the agreement as a relative value unit or RVU.

> on its own behalf or in conjunction with any other individual, company or other entity or person, directly or indirectly, manage, operate, control, be an agent for, participant in, or be connected in any manner with the ownership, operation or control of any corporation, partnership, proprietorship or other business entity primarily engaged in the provision of collection or billing services for radiology firms. This Covenant Not To Compete is the essence of the value of this agreement to MMS. Of the $2,700,000 payable hereunder, $2,690,000 is being paid for said Covenant Not To Compete.

While the Asset Purchase Agreement makes reference to the Billing Services Agreement, it does not recite that the two agreements are integrated or in any other fashion suggest that the terms or recitals of the Billing Services Agreement are incorporated in the Asset Purchase Agreement.

The agreements became effective in October 1992. The term of the Billing Services Agreement was 6 years.

In August 1993, sooner than one year after the effective date of the two agreements, MBI gave notice of termination of the Billing Services Agreement and accused MMS of failing to perform services as promised. The parties met to discuss the notice. One topic of discussion was MBI's entitlement to a Volume Bonus and a Collection Bonus. MMS alleged, and the jury that eventually tried the matter found, that Defendants Thacker and DeZonia, who are principals in MMS, induced MBI to withdraw its notice of

termination by promising to abide by Arthur Andersen's calculations of RVU's in the future. In any event, MMS continued to perform billing services for RS&J after the meeting, giving rise to an inference, at least, that the Billing Services Agreement was not terminated in 1993.

In August 1994, Dr. Reich, a principal in both RS&J and MBI, sent a second notice of termination of the Billing Services Agreement. He accused MMS of failing to perform the promised services, in the manner promised, and of withholding the Volume and Collection Bonuses to which MBI was entitled under the Billing Services Agreement.[2] On that same date, MBI and RS&J initiated the lawsuit giving rise to this appeal. They claimed, primarily, that MMS had breached the Billing Services Agreement by failing to pay the Volume and Collection Bonuses.[3] MBI and RS&J also claimed that they had been fraudulently induced to withdraw the first notice of termination by MMS's officials' promise to be bound by Arthur Andersen's calculation of RVU's for purposes of determining the amount to which MBI was entitled by way of the Collection Bonus. The jury found that MMS had fraudulently induced MBI to withdraw the notice of termination and awarded MBI $289,000 in compensatory damages.

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[2] The Billing Services Agreement provided for termination by MBI upon failure by MMS to pay a Volume Bonus to which MBI was entitled.

[3] The jury agreed that MMS had failed to pay the Volume and Collection Bonuses to which MBI was entitled. It awarded MBI damages in excess of $900,000, and MMS has not appealed that award.

MMS asserted a counterclaim for breach of the Asset Purchase Agreement. MMS argued that the $2.69 million payment had been intended as an up-front payment by MMS of money it would earn back during the six-year term of the Billing Services Agreement by virtue of the 15% service fee, which was well in excess of the market rate. MMS alleged that Drs. Reich and Seidelmann wanted the deal to be structured in that fashion so that money would go to MBI, where they would collect it, rather than to RS&J over time in the form of lower billing services fees, in which case Dr. Janicki would share it. MMS claimed, on that basis, that it was entitled to the return of that portion of the payment that was attributable to the approximately four years remaining on the Billing Services Agreement when MBI terminated it.

At the summary judgment phase of the proceedings below and in the post-trial phase, the district court concluded that the Asset Purchase Agreement was ambiguous. The court did not specifically identify any ambiguities in the Asset Purchase Agreement but made references to inconsistencies between the Asset Purchase Agreement and the Billing Services Agreement. The court also made special note of the following provision of the Asset Purchase Agreement, which the district court termed an "integration clause":

> This Agreement sets forth the entire agreement and understanding between the parties as to the subject matter of this Agreement and merges or supersedes all prior discussions, agreements and undertakings of every kind and nature between them with respect to the subject matter of this Agreement, and neither party to this Agreement may be bound by any

> condition, definition, warranty or representation other than expressly provided for in this Agreement.

On that basis, the court permitted a trial on MMS's counterclaim at which the parties presented extrinsic evidence of their intentions regarding the portion of the $2.7 million payment that was not intended as the purchase price for used office furniture.

MMS offered evidence that suggested that Dr. Reich, in particular, wanted an agreement pursuant to which RS&J would pay exorbitant billing fees that MBI would recoup through a large up-front payment from MMS. Such an agreement would inure to the benefit of Drs. Reich and Seidelmann, who owned MBI, at the expense of Dr. Janicki. MMS suggested that Drs. Reich and Seidelmann insisted on the ruse of a payment for a covenant not to compete in order to hide their true intentions. MMS offered circumstantial evidence to suggest that Dr. Reich later attempted to terminate the Billing Services Agreement because he wanted to sell RS&J's practice and the higher billing rate was causing RS&J's profits to be depressed.

MBI offered evidence that suggested that the payment was, in fact, for a covenant not to compete. In any event, however, the jury was persuaded that the payment had been intended as an up-front payment in exchange for a higher billing rate and awarded MMS damages in an amount representing the "unearned" portion of the up-front payment: $1,868,000.

RS&J also asserted a claim, as an intended third-party beneficiary, for breach of the Billing Services Agreement by MMS. At trial, the jury found, in addition to the findings set forth above, that RS&J was not entitled to damages for MMM's breach of the Billing Services Agreement and that RS&J was not a third-party beneficiary of that agreement.

After the jury returned its verdict, the district court granted a motion pursuant to Rule 50(b) of the Federal Rules of Civil Procedure pursuant to which MBI argued that MMS was not entitled to damages for breach of the Asset Purchase Agreement. The court continued in its belief that the Asset Purchase Agreement was ambiguous with respect to the nature of the $2.7 million payment. The trial judge concluded, however, that the jury should not have been permitted to consider all extrinsic evidence but should have been limited to consideration of the parties' post-agreement course of conduct. The court then concluded, based largely upon MMS's income tax return and 1993 financial statement, that MMS believed the payment to be for a covenant not to compete and not an up-front payment for an increased billing rate as the jury had concluded. On that basis, the court concluded that MMS was not entitled to damages for the breach of the Asset Purchase Agreement. The district court declined to grant judgment as a matter of law with respect to RS&J's claim for breach of the Billing Services Agreement or MBI's claim for fraudulent inducement.

I.

MBI, MMS, and RS&J have appealed from the district court's orders and opinions. The district court permitted those appeals on an interlocutory basis. The issues are

summarized here for the sake of clarity and ease of comprehension.

MMS appeals the district court's ruling on MBI's Rule 50(b) motion in which the court essentially set aside the jury's verdict on MMS's claim for breach of the Asset Purchase Agreement. MMS argues that the district court erred by considering grounds for relief under Rule 50(b) that were not raised in an earlier motion under Rule 50(a); by substituting its own judgment for that of the jury regarding which extrinsic evidence was critical; and by making its decision by considering only part of the evidence that was submitted at trial. MMS also appeals the district court's failure to set aside, on MMS's Rule 50(b) motion, the jury's verdict on MBI's fraudulent inducement claim. MMS contends that MBI failed to submit evidence of tort damages that are distinct from its damages for breach of the contract that was fraudulently induced.

RS&J appeals the district court's denial of its Rule 50(b) motion for judgment as a matter of law on the jury's findings that it was not a third-party beneficiary of the Billing Services Agreement and did not suffer damages as a result of its breach. RS&J contends that the jury's finding concerning its status as a third-party beneficiary was erroneous as a matter of law and that the evidence of record does not support the jury's finding that RS&J did not suffer damages as a result of MMS's breach of the Billing Services Agreement.

II.

A. MMS's Claim for Breach of the Asset Purchase Agreement

The district court applied Ohio law to the parties' contract claims. Under Ohio law, if the language of a contract is clear and unambiguous, a court may not resort to construction of that language. *See Hybud Equip. Corp. v. Sphere Drake Ins. Co. Ltd.*, 64 Ohio St.3d 657, 665, 597 N.E.2d 1096, 1102 (1992), *cert. denied*, 507 U.S. 987 (1993); *Karabin v. State Automobile Mut. Ins. Co.*, 10 Ohio St.3d 163, 167, 462 N.E.2d 403, 406 (1984). Only where the language of a contract is unclear or ambiguous or the circumstances surrounding the agreement endow the language with special meaning will extrinsic evidence be considered to give effect to the parties' intentions. *See Shifrin v. Forest City Enterprises., Inc.*, 64 Ohio St.3d 635, 597 N.E.2d 499, syllabus (1992). Words in a contract must be given their plain and ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall content of the document. *See Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146, syllabus ¶2 (1978). This court reviews *de novo* the district court's rulings on Rule 50 motions. *See Jackson v. Quanex Corp.*, 191 F.3d 647, 658 (6th Cir. 1999).

The Asset Purchase Agreement is not ambiguous as regards the nature of the $2.69 million payment by MMS. In both Schedule 9 and the Covenant Not To Compete provision of that agreement, $2.69 million of the purchase price is allotted to the covenant not to compete. Moreover, the covenant not to compete was unambiguously made effective

only for the term of the agreement or until the Billing Services Agreement was terminated. No provision of the Asset Purchase Agreement required that a portion of the purchase price be refunded in the event that MBI terminated the Billing Services Agreement before the end of its stated term. Accordingly, the district court should have concluded that MBI was entitled to judgment with respect to MMS's claim for breach of the Asset Purchase Agreement on the ground that the agreement was unambiguous and did not require that MBI refund any portion of the purchase price.

In short, the Asset Purchase Agreement unambiguously provided that the purchase price was for used furniture and a covenant not to compete. MMS has not argued that MBI violated the terms of the covenant not to compete while the Billing Services Agreement was in effect. Accordingly, MMS could not, as a matter of law, prove a breach of the Asset Purchase Agreement by MBI. The district court's decision on MBI's Rule 50(b) motion is VACATED for reasons other than those given by the district court, and, on remand, the district court is instructed to enter judgment, consistent with this opinion, in favor of MBI with respect to MMS's claim for breach of the Asset Purchase Agreement.

B. MBI's Fraudulent Inducement Claim

The jury found that MMS's principals, Thacker and DeZonia, fraudulently induced MBI to withdraw its first notice of termination by promising to be bound by Arthur Andersen's calculations of RVU's for purposes of establishing the amount of future Collection Bonus payments. After the trial, MMS moved, pursuant to Rule 50(b), for judgment as a matter of law with regard to the fraudulent inducement

claim arguing that MBI failed to introduce evidence of damages arising from the alleged fraud that were distinct from its damages resulting from the breach of the Billing Services Agreement. The district court denied MMS's Rule 50(b) motion with regard to that claim.

MBI based its claim for fraudulent inducement upon the promise by MMS to abide by Arthur Andersen's calculation of RVUs for purposes of determining the Collection Bonus to which MBI was entitled. MBI presented evidence at trial from which the jury could have found that MMS was already manipulating the data provided to Arthur Andersen for the purpose of minimizing the Collection Bonus when that promise was made. On the basis of that evidence, the jury could well have concluded that MMS omitted to tell MBI that it intended to provide altered or inaccurate data to Arthur Andersen, even though that fact would have been material to MBI in considering whether to exercise its right under the Billing Services Agreement to terminate that agreement. To the extent that MBI was able to adduce evidence to show that it suffered damages as a result of that omission, apart from the damages it suffered as a result of MMS's breach of the Billing Services Agreement, MBI would be entitled to recover the damages it proved. *See Cohen v. Lamko,* 10 Ohio St.3d 167, 169, 462 N.E.2d 407, 409 (1984) (elements of fraud under Ohio law); *Spencer v. Huff,* No. 97CA2543, 1998 WL 391948 at *3 (Ohio Ct. App. July 2, 1999) (elements of fraudulent inducement same as elements of fraud); *Binsack v. Hipp,* No. H-97-029, 1998 WL 334223 at *5 (Ohio Ct. App. June 5, 1998) (same).

MMS's specific contentions on appeal are that MBI did not adduce evidence at trial from which the jury could

properly have concluded that MBI suffered damages as a result from the fraudulent inducement that were distinct from its contractual damages and that MBI did not offer evidence from which the jury could have determined the amount of those damages without speculating. In ruling on MMS's Rule 50(b) motion, the district court noted that MBI had argued that "it was virtually impossible to arrive at appropriate calculations in the face of MMS's largely untraceable and unreversible [sic] RVU manipulation." The court further noted that MBI had introduced evidence that MMS's manipulation of the RVUs was "neither fully traceable nor fully reversible." The district court denied MMS's motion for judgment as a matter of law pursuant to Rule 50(b) with regard to the fraudulent inducement claim.

MBI concedes that any award of damages to MBI arising from the fraudulent inducement must be separate and distinct from the damages awarded to MBI on its claim for breach of the Billing Services Agreement. Ohio law goes further by requiring that fraud damages be limited to the injury actually arising from the fraud. The tort injury must be unique and separate from any injury resulting from a breach of contract. *See, e.g., Davison Fuel & Dock Co. v. Picklands Mather & Co.*, 54 Ohio App.2d 177, 182, 376 N.E.2d 965, 968 (Ohio Ct. App. 1977). MMS contends that MBI did not prove any damages arising from the fraudulent inducement that were separate from MBI's contract damages.

MBI contends that the issue is resolved by reference to the district court's instructions to the jury. Specifically, MBI identifies the following instruction:

> If you find fraud, however, and you also find that foreseeable damages flowed from that fraud, you may award all damages that you find to have been proven by the greater weight of the evidence, both direct and consequential. In this regard, I emphasize that any damages you award on this claim must proximately flow from the fraud and not from a breach of contract, if any, that you find occurred.

MBI argues that the district court's instruction was sufficiently clear that the jury's understanding that it could only award such damages as flowed from the fraud must be presumed. *See Morgan v. Shirley,* 958 F.2d 662, 668 (6th Cir. 1992) (citing *Francis v. Franklin,* 471 U.S. 307, 324 n.9 (1985)). MBI's argument is correct if evidence of damages flowing from the fraud and separate from the damages flowing from the breach of contract was before the jury.

At trial, MBI introduced internal records from MMS related to the calculation of RVUs for 1993. Those documents, which were apparently prepared in mid-1993[4], reflect an estimation by MMS that MBI would be entitled to a Collection Bonus in excess of $700,000 for 1993. MMS did not pay MBI a Collection Bonus in that amount. MBI argues

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[4] Those documents include actual collections for the first five months of 1993 and an estimate for June giving rise to an inference that MMS created them after May 31, 1993 and before actual figures for June were available. An inference that the documents predated the promise upon which MBI's fraudulent inducement claim is based is permissible.

that the documents demonstrate that MMS had manipulated the data it provided to Arthur Andersen before it promised to rely on Arthur Andersen's calculations. On the basis of those documents and certain testimony related to them, MBI argues that the jury was presented with evidence of damages flowing from the fraud.

The damages MBI identifies did not arise uniquely from MMS's fraudulent promise to rely on Arthur Andersen's calculations. The Billing Services Agreement entitled MBI to a Collection Bonus. If MMS failed to pay that bonus, whether because it manipulated the numbers provided to Arthur Andersen or for any other reason, it breached the Billing Services Agreement. MBI's damages for unpaid Collection Bonus money flow from that breach. Accordingly, the damages identified by MBI as supporting the jury's award on its fraudulent inducement claim are not of the type recognized as fraud damages under Ohio law.

This court perceives only one element of damages that could have arisen uniquely from the fraud. Because MBI was induced to withdraw its notice of termination of the Billing Services Agreement, it continued to pay MMS fifteen percent of the amounts it collected for services performed by RS&J until it finally terminated the Billing Services Agreement in 1994. To the extent that that rate was in excess of the market rate for similar services, the difference between fifteen percent and the market rate would constitute damages arising from MMS's fraud that did not also arise from its breach of the Billing Services Agreement.

MBI has not identified evidence of such damages that was introduced at trial, nor has it identified any other element

of damages that flowed from the fraud but not from the breach of contract. Accordingly, the district court erred in denying MMS's motion pursuant to Rule 50(b) for judgment with respect to MBI's claim for fraudulent inducement. Its decision in that regard is **REVERSED** with instructions to enter judgment in favor of MMS with respect to the fraudulent inducement claim.

C. RS&J's Claim for Breach of Contract

RS&J asserted a claim for breach of the Billing Services Agreement against MMS. The basis for the claim was that RS&J was an intended third-party beneficiary to that agreement and that RS&J had suffered a loss as a result of the breach of the agreement by MMS. The district court submitted the question of whether RS&J was an intended third-party beneficiary of the Billing Services Agreement to the jury, which found that it was not. The district court denied RS&J's Rule 50(b) motion with respect to its claim for breach of the Billing Services Agreement.

RS&J contends that the district court should have granted it a new trial on its breach of contract claim because the jury's finding that RS&J was not an intended third-party beneficiary of the Billing Services Agreement was without support in the record and contrary to law. We note, however, that the district court did not merely ask the jury whether RS&J was an intended third-party beneficiary, but it also asked whether RS&J suffered any damages from the breach of the Billing Services Agreement if it was an intended third-party beneficiary. The jury gave a negative response to that question. Accordingly, to the extent that the jury's finding concerning RS&J's damages finds support in the record,

RS&J was not prejudiced, even if the jury incorrectly concluded that RS&J was not an intended third-party beneficiary of the Billing Services Agreement.[5]

Because we find support in the record for the jury's finding that RS&J did not suffer damages as a result of MMS's breach of the Billing Services Agreement, we conclude that the district court did not err in denying RS&J's Rule 50(b) motion with regard to its claim as an intended third-party beneficiary of the Billing Services Agreement. The district court's decision in that regard is **AFFIRMED**.

III

For these reasons, the district court's decision on MBI's Rule 50(b) motion is **VACATED**, for reasons other than those given by the district court, and on remand, the district court is instructed to enter judgment, consistent with this opinion, in favor of MBI with respect to MMS's claim for breach of the Asset Purchase Agreement. The district court's decision denying MMS's Rule 50(b) motion with respect to MBI's claim for fraudulent inducement is **REVERSED** with instructions to enter judgment in favor of MMS with respect to that claim. The denial of RS&J's Rule 50(b) motion with regard to its claim as an intended third-party beneficiary of the Billing Services Agreement is **AFFIRMED**.

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[5] It is, perhaps, noteworthy that RS&J did not object to the form of the interrogatories to the jury.

CONCURRING IN PART, DISSENTING IN PART

MERRITT, Circuit Judge, concurring in part and dissenting in part. While I concur in Sections II. B. and II. C., I disagree with the majority's holding in Section II. A. that the district court should have entered judgment for Medical Billing on the basis that Medical Management was not entitled to the $1.8 million jury award because the Asset Purchase Agreement was unambiguous on its face. It is clear from Ohio law that unless facial ambiguities infected the Asset Purchase Agreement, parole evidence should not have been admitted and considered by the jury. It is my contention, however, that facial ambiguities did indeed infect these two documents.

The Billing Services Agreement clearly states that the services provided by Medical Management will be "in partial consideration for" the Asset Purchase Agreement. It is unclear from the face of the documents what was intended by that language. In addition, paragraph three of the section of the Asset Purchase Agreement outlining the obligations between the parties is entitled "Billing Services Agreement," and describes the billing services arrangement between the two parties. A jury could reasonably construe the inclusion of that paragraph as conditioning performance of the Asset Purchase Agreement on performance of the Billing Services Agreement, especially when combined with the language which indicates that the Billing Services Agreement was "partial consideration" for the Asset Purchase Agreement. I find the terms to be ambiguous on their face, and thus I would uphold the jury's verdict on the basis that it was not error for the jury to consider the extensive extrensic evidence it had

before it when it concluded that Medical Management was entitled to a $1.8 million jury award.

Given that I believe the parole evidence was admissible, the district court's judgment as a matter of law should have been reviewed by taking into account all of the information that was before the jury when they made their determination. No party to this litigation has articulated to this court a clear equitable argument that they are in the "right." Medical Billing admitted in its paperwork to a potential buyer that the rate it was being charged under the Medical Management billing services contract was "above market," indicating that the company understood the game it was playing with Medical Management. In addition, the potential sale of the Reich, Seidelman & Janicki practice during the same month as their first attempt to terminate the Medical Management contract gives an observer pause as to their intentions, not to mention the evidence that Drs. Reich and Seidelman may have intended to pocket the $2.7 million and construct a reason to terminate as soon as possible. Finally, the jury seems to have found plausible the idea that Drs. Reich and Seidelman were attempting to hide from their partner Janicki the fact that they had been receiving premium rates, essentially skimming off the top of their radiology practice, and that they therefore wished for Medical Management to continue to bill at the above-market which they had been charging in order not to alert Dr. Janicki to the difference in pricing once the billing was outsourced.

Medical Management, in turn, indicated to the IRS that it purchased a covenant not to compete and some office furniture, not a "premium billing contract," showing their own knowledge that this was more than a purchase of the

right to bill at a 15% rate--at least in form. The information which they were sanctioned for not disclosing to Medical Billing during this litigation also tends to show that they believed they had purchased a covenant not to compete. And, importantly, they have working against them a letter indicating that they understood the risk that they *could lose* the $2.7 million purchase price upon termination. The decision of the jury could not have been an easy one to make.

The proper standard of review of motions for judgment as a matter of law in the Sixth Circuit for diversity cases is the standard for a directed verdict employed by the state whose substantive law governs the action, in this case, Ohio. *See Potti v. Duramed Pharmaceuticals, Inc.*, 938 F.2d 641, 645 (6th Cir. 1991). Under Ohio law, a court must consider the evidence in the light most favorable to the party against whom the motion is made, and may grant the motion only if, taking the evidence in this light, there is but one reasonable conclusion as to the proper verdict. *See id.*

It is not possible to say that there is only one reasonable conclusion as to the proper verdict in this case when the entirety of the evidence which the jury considered is examined. The decision of the jury should stand because the evidence shows that not only has neither party demonstrated that they are clearly in the right, but in fact both parties have called attention to each other's numerous mistakes and ambiguities both in word and in action. The jury heard the evidence and were in a better position to weigh its credibility than this court. In fact, the trial judge indicated that based on her review of the whole record the evidence was "somewhat equivocal," and indicated that if the parol evidence were included, then she believed the decision of the

jury should stand. I agree, and for that reason I would REVERSE the decision of the district court vacating the jury's decision.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed May 8, 2000]

Nos. 98-3561/3564

MEDICAL BILLING, INC.,	)
Plaintiff-Appellee,	)
	)
REICH, SEIDELMANN &	)
JANICKI,	)
Plaintiff-Appellee/	)
Cross-Appellant,	)
	)
v.	)
	)
MEDICAL MANAGEMENT	)
SCIENCES, INC.; JAMES F.	)
THACKER; WILLIAM J.	)
DEZONIA, JR.,	)
Defendants-Appellants/	)
Cross-Appellees.	)
	)

Before: MERRITT and SILER, Circuit Judges; BECKWITH, District Judge.

REVISED JUDGMENT

On Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED in part, REVERSED in part, and, on remand, the district court is instructed to enter judgment, consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed March 26, 1998]

No. 1:94-CV-1567

MEDICAL BILLING, INC., AND REICH, SEIDELMANN & JANICKI, *Plaintiffs, Defendants to Counterclaim,*	)
v.	)
MEDICAL MANAGEMENT SCIENCES, INC., *Defendant and Counter-claimant,*	)
v.	)
DR. NORBERT E. REICH, et al., *Additional Defendants to Counterclaim.*	)

ORDER OF JUDGMENT

In accordance with the jury verdict and jury interrogatories rendered on November 27, 1996, and with the Court's Memorandum and Opinion of even date granting in part and denying in part the parties' motions for certain post-judgment relief, the Court now **AMENDS** its November 27, 1996 Order of Judgment, nunc pro tunc, to read as follows:

1. On plaintiff MBI's claim against defendant MMS for breach of contract, judgment is hereby entered in favor of MBI. Total compensatory damages awarded to MBI on this claim are $952,000.00, plus pre-judgment interest from the date of breach of contract, August 1, 1994, through the date of entry of Order of Judgment, November 27, 1996.

2. On plaintiff RS&J's claim against defendant MMS for breach of contact, judgment is hereby entered in favor of MMS.

3. On plaintiff MBI's claim against defendants MMS, William J. DeZonia, Jr., and James F. Thacker, for fraudulent inducement, judgment is hereby entered in favor of MBI. Total compensatory damages awarded to MBI on this claim are $289,000.00, for which the defendants are jointly and severally liable. No punitive damages are awarded in connection with this claim, and no pre-judgment interest is awarded in connection with this claim.

4. On counterclaim-plaintiff MMS's claim against counterclaim-defendant MBI for breach of the Asset Purchase Agreement, judgment is hereby entered in favor of MBI.

5. On counterclaim-plaintiff MMS's claim against counterclaim-defendant MBI for breach of the Billing Services Agreement, judgment is hereby entered in favor of MMS. Total compensatory damages awarded to MMS on this claim are $225,000.00, plus pre-judgment interest during: (a) the period of August 1, 1994 (the date of contract breach) through November 1, 1995 (the date trial was originally scheduled); and (b) October 16, 1996 (the date the trial finally began) through November 27, 1996 (the date of entry of Order of Judgment). MMS is not entitled to pre-judgment interest on the $225,000 during the interim period of November 2, 1995 through October 15, 1996, inclusive.

6. On counterclaim-plaintiff MMS's claim against counterclaim-defendants MBI, RS&J, Norbert Reich, and Frank Seidelmann, for unjust enrichment, judgment is hereby entered in favor of MBI, RS&J, Norbert Reich, and Frank Seidelmann.

7. As a sanction for abuse of the discovery process, the Court awards to MBI attorney's fees and costs in the amount of $83,886.02, for which MMS and its former counsel, Hahn Loeser & Parks, are jointly liable. Post-judgment interest on this amount shall run from the date of the filing of this amended Order of Judgment.

8. Counterclaim-plaintiff MMS's bifurcated claims against counterclaim-defendants MBI, RS&J, Norbert Reich, and Frank Seidelmann, for fraudulent conveyance and alter ego liability, remain pending.

9. Because the Court's determinations above are, for all practical purposes, a final adjudication on the merits of

all substantive claims in this case, and because there is no just reason for delay in entering judgment on the parties' substantive claims, such that those claims can become immediately ripe for appeal, the Court hereby certifies, pursuant to Fed. R. Civ. P. 54(b), that there is no just reason for delay in entering judgment on those claims already decided, and this Order of Judgment represents the Court's final Order of Judgment as to those claims.

IT IS SO ORDERED.

/s/_____
KATHLEEN McDONALD O'MALLY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed March 26, 1998]

No. 1:94-CV-1567

MEDICAL BILLING, INC., AND REICH, SEIDELMANN & JANICKI,
Plaintiffs, Defendants to Counterclaim,

v.

MEDICAL MANAGEMENT SCIENCES, INC.,
Defendant and Counter-claimant,

v.

DR. NORBERT E. REICH, et al.,
Additional Defendants to Counterclaim.

MEMORANDUM & ORDER

Following a jury verdict and entry of order ofjudgment in this case, the parties timely filed these post-judgment motions: (1) plaintiffs' motion for judgment notwithstanding

the verdict, for judgment as a matter of law, to alter or amend the judgment, and/or for new trial (docket no. 269); (2) defendants' motion for post-verdict relief (docket no. 270); and (3) plaintiffs' motion for attorney's fees and costs (docket no. 296). For the reasons stated below, the Court rules as follows:

1. Plaintiffs' motion for judgment notwithstanding the verdict, for judgment as a matter of law, to alter or amend the judgment, and/or for new trial is **GRANTED IN PART AND DENIED IN PART**. Specifically, the Court: (a) grants plaintiffs' motion to amend the jury's award of $952,000 in damages to include pre-judgment interest; (b) grants plaintiffs' motion for entry of judgment as a matter of law, notwithstanding the verdict, as to defendants' counterclaim for breach of the Asset Purchase Agreement, and therefore as to $1,868,000 of the $2,093,000 in contract damages awarded against plaintiffs; and (c) denies plaintiffs' motion in all other respects.

2. Defendants' motion for post-verdict relief is **GRANTED IN PART AND DENIED IN PART.** Specifically, the Court: (a) grants defendants' motion to amend the jury's award of $225,000 in contract damages, for breach of the Billing Services Agreement, to include pre-judgment interest; (b) grants defendants' motion to amend the Court's entry of judgment to make clear that defendants' bifurcated claims remain pending; (c) grants defendants' motion to otherwise enter judgment so as to allow the parties

to immediately appeal the Court's Orders; and (d) denies defendants' motion in all other respects.

3. Plaintiffs' motion for attorney's fees and costs is **GRANTED IN PART**. Specifically, the Court grants the motion for fees and costs, and awards plaintiffs $83,886.02.

The Court will issue separately an amended order of judgment, nunc pro tunc, reflecting its decisions.

I. General Background.

This case presents a complicated breach of contract action involving several parties. A somewhat simplified version of the allegations and claims follows. Dr. Norbert Reich and Dr. Frank Seidelmann are radiologists. The two doctors practice with the firm of Reich, Seidelmann & Janicki ("RS&J"), a plaintiff in this case. In order to bill RS&J's radiology patients, Drs. Reich and Seidelmann formed a medical billing company called Medical Billing, Inc. ("MBI"). MBI is a co-plaintiff in this case.

Originally, MBI performed billing services only for RS&J; later, MBI expanded to perform billing services for two other radiology practices as well. In 1992, MBI engaged in contract discussions with a larger, national medical billing company called Medical Management Sciences ("MMS"), a defendant in this case. During these negotiations, MBI was represented by Drs. Reich and Seidelmann, while MMS was represented by its Chairman of the Board, James Thacker, and its President, William DeZonia, Jr., both of whom are co-defendants.

MBI and MMS eventually agreed to a cooperative venture via three separate but inter-related contracts: an Asset Purchase Agreement, a Billing Services Agreement, and a Software License Agreement.

The Asset Purchase Agreement recites that MMS will pay $2.7 million to MBI, in exchange for: (1) some furniture; and (2) a covenant that MBI would not compete with MMS, for six years, in the field of provision of medical billing services. The contract stated that the furniture was worth $10,000 of the $2.7 million consideration, and the non-competition clause was worth the remaining $2.69 million. The Asset Purchase Agreement also expressly required that the parties enter into the Billing Services Agreement.

In the Billing Services Agreement, the parties arranged a limited exception to the covenant not to compete contained in the Asset Purchase Agreement -- the parties agreed that MBI could keep its existing three radiology practice clients. However, the parties further agreed that MMS would actually provide the medical billing services to those three radiology practices -- essentially, MBI subcontracted all of its own three billing service contracts, remaining a middle-man. The outline of the Billing Services Agreement was as follows: (1) MMS would bill the patients of the three radiology practices; (2) MMS would deposit the revenue it collected with MBI; (3) MBI would then pay back to MMS various percentages (generally about 15%) of the revenue it received from MMS.[1]

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[1] Presumably, MBI would then take a cut of the remaining 85% of the revenue it received, and remit the rest to the underlying radiology practices.

The Billing Services Agreement also included several minimum payment guarantees and incentives. For example, the Billing Services Agreement stated that, during the first two years of the contract, MMS would pay MBI a minimum amount of revenue, regardless of MMS's actual collections.[2] MMS also promised to pay MBI a "volume bonus" if the three radiology practices sufficiently increased the number and complexity of procedures they performed and billed. In turn, MBI promised to pay MMS a bonus, depending on the efficacy of its revenue collection efforts. The Billing Services Agreement had a term of six years, but could be termimted by MBI earlier if; among other reasons, MMS: (l) failed to pay MBI the guaranteed minimum level of revenue; (2) failed to pay MBI any volume bonus due; or (3) otherwise failed to perform.

Finally, the parties entered into a Software Licensing Agreement. The Software Licensing Agreement essentially stated that, if the Billing Services Agreement terminated for any reason (including its natural termination after 6 years), then MMS would license its medical billing software to MBI for another 5 years after termination. This way, MBI could continue to perform uninterrupted medical billing services for its three radiology practice clients, even if MMS ceased doing

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[2] Thus, for example, even if MMS collected only $12,530,000 in revenue during the first year of the Billing Services Agreement, it had guaranteed payment to MBI of $13,280,000 (assuming other variables). The parties referred to any difference between MMS's collections and the guaranteed payment to MBI as the "shortfall."

so directly. Under this Software License agreement, MBI would pay MMS a monthly software license fee.

In its amended complaint, MBI alleges that MMS failed to pay MBI the amounts owed under the Billing Services Agreement. Specifically, MBI alleges MMS failed to pay MBI: (1) the guaranteed minimum revenue, or "shortfall;" and (2) the volume bonus. MBI also asserts MMS breached the Billing Services Agreement by: (1) withholding access to MBI's own patient records and related computer data tapes; and (2) engaging in shoddy billing practices, which led to complaints against MBI from doctors, hospitals, and patients.

Because of MMS's alleged breaches of the Billing Services Agreement, MBI notified MMS in August of 1993 that it intended to terminate the Billing Services Agreement on October 15, 1993. MMS, through Thacker and DeZonia, then allegedly persuaded MBI to retract its termination. MBI asserts, however, that Thacker and DeZonia managed to procure this retraction only through "fraudulent misrepresentations," so that MBI ultimately "re-terminated" in August 1994. Following MBI's 1994 termination of the Billing Services Agreement, MBI sought the use of MMS's billing software, pursuant to the Software Licensing Agreement. MBI alleges MMS did not cooperate, thus leading to MMS's breach of the Software Licensing Agreement, as well.

Based on these allegations, plaintiffs MBI and RS&J asserted the following claims in their amended complaint: (1) both plaintiffs sought an injunction compelling MMS to turn over certain billing computer tapes, and to provide the

software discussed in the Software Licensing Agreement; (2) MBI sued MMS for breach of contract; (3) RS&J sued MMS for breach of contract, asserting standing as a third party beneficiary; (4) both plaintiffs sued MMS for conversion of billing data and records; (5) both plaintiffs sued MMS for an accounting and imposition of a constructive trust; and (6) both plaintiffs sued MMS, Thacker, and DeZonia for fraudulently inducing MBI to retract its October 15, 1993 termination of the Billing Services Agreement.

MSS responded by asserting several counterclaims. MMS alleges that it did not breach any of the agreements and that, rather, MBI did so. Specifically, MMS alleges that MBI: (1) breached the Billing Services Agreement by failing to pay to MMS the roughly 15% of revenues MMS had collected and given to MBI; (2) breached the Billing Services Agreement by terminating it without cause; and (3) breached the Asset Purchase Agreement by retaining the entire $2.7 million[3] In addition, MMS alleges that Drs. Reich and Seidelmann purposely undercapitalized MBI, and improperly diverted to themselves the $2.7 million received under the Asset Purchase Agreement.

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[3] MMS alleged MBI was not entitled to retain the entire $2.69 million that MBI had received in exchange for agreeing to the non-compete clause in the Asset Purchase Agreement, because this money was in exchange for MMS's right, as provided in the Billing Services Agreement, to provide billing services to the three radiology practices for the full six years. Thus, MMS alleged MBI was required to return a portion of the $2.7 million purchase price upon early termination of the Billing Services Agreement, regardless of the grounds for termination.

Based on these allegations, MMS asserted the following amended counterclaims: (1) breach of contract against MBI; (2) alter ego liability for MBI's breach of contract, against Drs. Reich and Seidelmann individually; (3) fraudulent conveyance against MBI and Drs. Reich and Seidelmann individually; (4) unjust enrichment against MBI, RS&J, and Drs. Reich and Seidelmann individually; and (5) conversion against MBI and Drs. Reich and Seidelmann individually.

Before and during trial, the Court made four notable rulings. First, the Court granted plaintiffs' motion to bifurcate the trial, saving for the second half of trial the defendants' alter ego and fraudulent conveyance counterclaims. These counterclaims, which MMS had asserted only against Drs. Reich and Seidelmann individually, can be characterized as "collection-related," as MMS acknowledges frankly that it asserted these counterclaims primarily to ensure satisfaction of any judgment against MBI. Second, the Court found that MMS and its previous counsel had engaged in serious discovery abuses, including destruction and alteration of some evidence. Although the Court imposed sanctions on MMS and its counsel, the Court

ruled that MBI could not assert an independent cause of action for "spoliation" premised on those discovery abuses.[4]

The Court issued its other two notable rulings during a "charging conference" with the parties regarding jury instructions. The third ruling was that the Court would not instruct the jury that RS&J could recover on a claim against the defendants for fraudulently inducing MBI to retract its October 15, 1993 termination of the Billing Services Agreement. Essentially, the Court held that, as a matter of law, RS&J could not claim it was induced to enter into an agreement to which it was not a party, even if RS&J could validly be characterized as a third-party beneficiary to that agreement. And fourth, the Court allowed the defendants to amend their pleading to conform their breach of contract claim to the evidence. Specifically, defendants had claimed in their counterclaim only that MBI breached the Billing Services Agreement and Asset Purchase Agreement by wrongfully terminating the Billing Services Agreement on August 27, 1993. The Court allowed defendants to amend this claim to assert MBI had breached the Billing Services Agreement and Asset Purchase Agreement by wrongfully terminating the Billing Services Agreement either on August 27, 1993, or when MBI "re-terminated" on August 1, 1994.

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[4] MBI attempted to assert this claim in a separate cause of action, which it then attempted to consolidate with this case (rather than by way of an amended complaint). When the Court dismissed that separate action, MBI filed an immediate appeal. The Sixth Circuit recently affirmed this Court's refusal to entertain MBI's spoliation claim; thus, the validity of this Court's ruling on MBI's spoliation claim is no longer at issue.

Finally, the Court notes that, by the time of trial, events had mooted plaintiffs' claims for injunctive relief and for an accounting, the parties agreed the Court did not need to address these claims and that the Software Licensing Agreement was no longer at issue. Also, the parties agreed not to pursue their conversion claims against each other, because these claims were essentially duplicative of their other claims and counterclaims. Thus, at the final charging conference, no party asked the Court to instruct the jury regarding a conversion claim.

Following these rulings and a six-week trial, the jury deliberated and returned a verdict. In addition to a general verdict form, the Court had the jury fill out interrogatories. The jury's conclusions, as revealed by the verdict form and interrogatory responses, were as follows:

1. the Billing Services Agreement was terminated on August 1, 1994, not October 15, 1993.

2. MMS breached the Billing Services Agreement, causing MBI $952,000 in damages;

3. of this $952,000 in damages caused to MBI, $29,000 represented losses "recoverable by virtue of MBI's 'recoding project'";

4. MMS, DeZonia, and Thacker were all liable for fraudulently inducing MBI to retract its October 15, 1993 termination of the Billing Services Agreement, and were jointly and severally liable to MBI for $289,000 in compensatory damages;

5. in relation to MBI's fraudulent inducement claim, the defendants were not liable for punitive damages;

6. MBI breached the Billing Services Agreement, causing damages to MMS of $225,000;

7. 100% of the $225,000 in contract damages caused to MMS represented "unpaid service fees;"

8. MBI breached the Asset Purchase Agreement, causing damages to MMS of $1,868,000;

9. 100% of the $1,868,000 in contract damages caused to MMS represented "repayment of a portion of the $2.7 million paid to MBI in October of 1992;" and

10. no counter-defendant was liable to MMS for unjust enrichment.[5]

Thus, the chart on the following page summarizes the outcome of each claim and counterclaim asserted by the parties.

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[5] MMS's unjust enrichment claim was predicated on MMS having supplied MBI with billing services after MBI's first alleged termination of the Billing Services Agreement on October 15, 1993. Because the jury concluded the Billing Services Agreement was terminated on August 1, 1994, not October 15, 1993, the jury simply wrote "N/A" in regards to the unjust enrichment claim. This is tantamount to a verdict against MMS on this claim.

District Court Memorandum & Order - 3/26/98

FOLD-OUT CHART

Claimant(s)	Defendant(s)	Claim	Result	Damages Awarded
MBI and RS&J	MMS	injunctive relief	mooted/abandoned	—
MBI	MMS	breach of Billing Services Agreement contract	jury verdict for MBI	$952,000
RS&J	MMS	breach of Billing Services Agreement contract	jury verdict for MMS	—
MBI and RS&J	MMS	conversion	mooted/abandoned	—
MBI and RS&J	MMS	accounting and constructive trust	mooted/abandoned	—
MBI	MMS	fraudulent inducement	jury verdict for MBI	$289,000 joint & sev.
MBI	DeZonia	fraudulent inducement	jury verdict for MBI	$289,000 joint & sev.
MBI	Thacker	fraudulent inducement	jury verdict for MBI	$289,000 joint & sev.
RS&J	all defendants	fraudulent inducement	disallowed by the Court	—
Counter-Claimant(s)	**Counter-Defendant(s)**	**Claim**	**Result**	**Damages Awarded**
MMS	MBI	breach of Billing Services Agreement contract	jury verdict for MMS	$225,000
MMS	MBI	breach of Asset Purchase Agreement contract	jury verdict for MMS	$1,868,000
MMS	Reich and Seidelmann	alter ego liability	bifurcated	—
MMS	MBI, Reich, and Seidelmann	fraudulent conveyance	bifurcated	—
MMS	MBI, RS&J, Reich, and Seidelmann	unjust enrichment	jury verdict against MMS	—
MMS	MBI, Reich, and Seidelmann	conversion	mooted/abandoned	—

The Court proceeded to enter an order of judgment in accordance with the jury's verdict. Specifically, the Court entered judgment: (1) in favor of MBI on its breach of contract claim against MMS, and awarded $952,000 in damages; (2) in favor of MMS on RS&J's breach of contract claim against MMS; (3) in favor of MBI on its fraudulent inducement claim against all defendants, and awarded $289,000 in joint and several damages; and (4) in favor of MMS on its breach of contract counterclaim against MBI, and awarded $2,093,000 in damages. See Order of Judgment (Nov. 27, 1996). The Court then concluded its judgment entry with the statement that "[a]ll other claims asserted in this matter are dismissed." The Court later stayed execution on this order of judgment pending its consideration of post-trial motions.

The parties now move for various species of post-judgment relief.

II. Standards for Relief.

A. Judgment as a Matter of Law

Federal Rule 50(b) governs post-verdict motions for judgment as a matter of law. Pursuant to Rule 50(b), this Court has the power to grant judgment as a matter of law as to any "claim or defense that cannot under the controlling law be maintained." Fed. R. Civ. P. 50(b). The "standard for granting a renewed motion for judgment as a matter of law under Rule 50(b) is precisely the same as the standard for granting the pre-submission motion" 9A Wright & Miller, Federal Practice and Procedure: Civil 2d §2537 at 347 (3rd ed. 1995) (footnote omitted).

Rule 50(b) applies essentially the same standard of review to a motion for judgment as a matter of law as to a motion for a directed verdict. See Advisory Committee Notes on 1991 Amendment to Fed. R. Civ. P. 50; Gillentine v. Vanzant, 1994 WL 693264 at *6 (6th Cir. Dec. 9, 1994). Rule 50(b) allows the court to enter judgment as a matter of law "when the facts are sufficiently clear that the law requires a particular result." 9A Wright & Miller, Federal Practice and Procedure: Civil 2d §2521 at 240 (3rd ed. 1995). Whether evidence presented at trial was "sufficient to create an issue of fact for the jury or will permit the court to enter judgment as a matter of law is solely a question of law to be determined by the trial court." Id. §2524 at 249 (footnote omitted); O'Neill v. Kiledjian, 511 F.2d 511, 513 (6th Cir. 1975).

In the Sixth Circuit, "the appropriate standard for measuring the sufficiency of the evidence to direct a verdict under Rule 50 . . . is whether there is evidence upon which the jury could properly support a verdict in favor of the party against whom the motion is made." Patrick v. South Central Bell Tel. Co., 641 F.2d 1192, 1197 (6th Cir. 1980) (citation omitted). The ultimate question is whether the jury could properly find for the non-moving party when the correct legal standard is applied. Markman v. Westview Instruments. Inc., 52 F.3d 967, 974 (Fed. Cir. 1995), affirmed, 517 U.S. 370 (1996).

The Sixth Circuit has held that "a federal court sitting in diversity applies the standard for a directed verdict used by the courts of the state whose substantive law governs the action." Potti v. Duramed Pharmaceuticals, Inc., 938 F.2d 641, 645 (6th Cir. 1991) (applying directed verdict standard

under Ohio law where Ohio law governed claims in diversity action). Ohio courts "require that a court presented with a motion for a directed verdict construe the evidence and all permissible inferences therefrom most strongly in favor of the party against whom the motion is made and consider neither the weight of the evidence nor the credibility of the witnesses in disposing of the motion." Id. Under Ohio law, a directed verdict motion "will be granted only if, after considering the evidence in this light, there can be but one reasonable conclusion as to the proper verdict." Id. The analogous procedural rule in Ohio provides that this Court has broad discretion to direct a verdict "upon any determinative issue [regarding which] reasonable minds could come to but one conclusion upon the evidence submitted." Ohio R. Civ. P. 50(A)(4); Anchor v. O'Toole, 94 F.3d 1014, 1022 (6th Cir. 1996). "If the evidence 'points so strongly in favor of the movant that reasonable minds could not come to a different conclusion, then the motion should be granted.'" Marsh v. Arn, 937 F.2d 1056, 1060 (6th Cir. 1990) (citations omitted).

In determining whether to grant judgment as a matter of law, the Court is not free to weigh the parties' evidence or to pass upon the credibility of witnesses. Black v. Zaring Homes, Inc, 104 F.3d 822, 825 (6th Cir. 1997), cert. denied, 118 S. Ct. 172 (1997); K & T Enters. v. Zurich Ins. Co., 97 F.3d 171, 175 (6th Cir. 1996). Nor may the Court substitute its own judgment for that of the jury. Zaring Homes, 104 F.3d at 825; K & T Enters., 97 F.3d at 175-76. Instead, the Court must view the evidence most favorably to the party against whom the motion is made and give that party the benefit of all reasonable inferences from the record. Zaring Homes, 104 F.3d at 825; K & T Enters., 104 F.3d at 176. When the evidence would permit reasonable minds to differ

on the issues decided by the jury, a motion for judgment as a matter of law must be denied. American and Foreign Ins. Co. v. Bolt, 106 F.3d 155, 157 (6th Cir. 1997). In short, every effort must be made to uphold the verdict if reasonably possible.

B. New Trial.

Pursuant to Fed. R. Civ. P. 59(a) & (e), the Court is empowered to grant a new trial and/or to "alter or amend a judgment." Fed. R. Civ. P. 59(a) & (e). "The authority to grant a new trial is confided almost entirely to the exercise of discretion on the part of the trial court" and "it is the duty of the judge to set aside the verdict and grant a new trial if [s]he is of the opinion that the verdict is against the clear weight of the evidence." Williamson v. Owens-Illinois, Inc., 1986 WL 16533 at *3 (6th Cir. Feb. 11, 1986) (quoting 11 Wright & Miller, Federal Practice and Procedure, § 2806 (1973)). "Thus, on a motion for a new trial, as contrasted with a motion for directed verdict or for judgment n.o.v., the judge may set aside the verdict even though there exists substantial evidence to support it." Id.

Motions for a new trial are governed by Rule 59(a). In "a diversity case, the question of whether a new trial is to be granted is a federal procedural question and is to be decided by reference to federal law." Toth v. Yoder Co. 749 F.2d 1190, 1197 (6th Cir. 1984); Anchor v. O'Toole, 94 F.3d 1014, 1021 (6th Cir. 1996). When "reviewing a motion for a new trial, a court should indulge all presumptions in favor of the validity of the jury's verdict." Brooks v. Toyotomi Co., Ltd., 86 F.3d 582, 588 (6th Cir. 1996) (citing Radar Benson, Inc. v. Kassab, 325 F.2d 591, 594 (3d Cir.

1963)). The district court "should refrain from interfering with a jury's verdict unless it is clear that the jury reached a seriously erroneous result." Id. A jury verdict must be upheld so long as there is any competent and substantial evidence in the record to support it, even if contradictory evidence was presented. Green v. Francis, 705 F.2d 846, 849 (6th Cir. 1983).

A motion for a new trial should be denied "if the verdict is one which could reasonably have been reached, and the verdict should not be considered unreasonable simply because different inferences and conclusions could have been drawn or because other results are more reasonable." J.C. Wyckoff & Assocs. v. Standard Fire Ins. Co., 936 F.2d 1474, 1487 (6th Cir. 1991); see also Brooks v. Toyotomi Co., Ltd., 86 F.3d 582, 588 (6th Cir. 1996) (conflicting evidence, standing alone, "is not sufficient to justify overturning the jury's verdict"). The simple fact that "the grant of a new trial might result in a different outcome is not a valid ground for disturbing a jury's verdict which is otherwise based upon legally sufficient evidence." Brooks, 86 F.3d at 588 (citation omitted). The "true standard for granting a new trial on the basis of the weight of the evidence is simply one which measures the result in terms of whether a miscarriage of justice has occurred." Fireman's Fund Ins. Co. v. Aalco Wrecking Co., Inc., 466 F.2d 179, 187 (8th Cir. 1972), cert. denied, 410 U.S. 930 (1973).

C. Entry of a "Final Judgment."

As described by the Supreme Court, Rule 54(b) contemplates that the district court will act "as a 'dispatcher.' It is permitted to determine, in the first instance, the

appropriate time when each 'final decision' upon 'one or more but less than all' of the claims in a multiple-claims action is ready for appeal." Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 435 (1956).

Under Rule 54(b), a court may enter a final judgment on fewer than all the claims in a case "only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment on one or more claims" in a multi-claim action. Solomon v. Aetna Life Ins. Co., 782 F.2d 58, 60 (6th Cir. 1986). Entry of final judgment on fewer than all claims under Rule 54(b) "recognizes the practical finality of a decision as to certain claims and permits such a decision to be appealed as a final judgment." Good v. Ohio Edison Co., 1997 WL 4538 at *1 (6th Cir. Jan. 8, 1997). Certification under Rule 54(b) strikes "a balance between the undesirability of more than one appeal in a single action and the need for making review available in . . . multiple-claim situations at a time that best serves the needs of the litigants." Day v. NLO, Inc., 3 F.3d 153, 155 (6th Cir. 1993) (quoting Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2654 (1983)). To certify an order under Rule 54(b), the Court must "do more than just recite the 54(b) formula of 'no just reason for delay'" and must provide a reasoned explanation. Solomon, 782 F.2d at 61.

III. Plaintiffs' Motion for Post-Judgment Relief.

In their motion for post-judgment relief, plaintiffs request the Court to modify the judgment in a number of ways, and for a number of reasons. In its memorandum in support, however, plaintiffs offer no argument in support of

several of these requests. As to these unsupported requests, the Court deems plaintiffs' positions unestablished and denies the requested relief (without prejudice to any appeal rights). Each of plaintiffs' requests is discussed separately, below.

A. Amend the Award of $952,000 to Include Pre-Judgment Interest.

MBI cites Ohio Rev. Code §1343.03 and argues that the Court should amend the jury award of $952,000 in contract damages to include pre-judgment interest, running from the date of contract termination (August 1, 1994) through the date of judgment entry. The cited statute states that

> when money becomes due and payable upon any bond, bill, note, or other instrument of writing, upon any book account, upon . . . all judgments, decrees, and orders of any judicial tribunal for the payment of money arising out of tortious conduct or a contract or other transaction, the creditor is entitled to interest at the rate of ten per cent per annum.

Ohio Rev. Code §1343.03(A). Ohio courts have stated that, under this statute, "[i]n order for a party to be entitled to pre-judgment interest, the underlying debt must be liquidated." General Acc. Ins. Co. v. Insurance Co. of N. Am., 629 N.E.2d 1373, 1375 (Ohio Ct. App. 1993), motion overruled, 627 N.E.2d 1004 (Ohio 1994). The underlying debt "is liquidated if it is certain and ascertainable," id., and a debt is ascertainable if it can be easily calculated. Ford v. Tandy Transp. Inc., 620 N.E.2d 996, 1010 (Ohio Ct. App. 1993);

Finn v. Krumrov Constr. Co., 589 N.E.2d 58, 64 (Ohio Ct. App. 1990), motion overruled, 565 N.E.2d 605 (Ohio 1990).

Regarding the $952,000 in contract damages awarded to MBI, MMS does not argue MBI is not entitled to pre-judgment interest.[6] Further, the Court finds (and the parties agree) that the vast majority of the contract damages awarded by the jury represent guaranteed revenue payments and volume bonuses due under the Billing Services Agreement. These amounts were easily ascertainable and clearly liquidated by, at the latest, August 1, 1994. Accordingly, the Court grants MBI's request and amends the jury's award of $952,000 to include pre-judgment interest, at the rate of 10% per annum beginning on August 1, 1994.

B. Grant a New Trial Regarding Contract Damages to Allow Punitive Damages.

MBI argues in its motion that the Court "committed legal error by failing to instruct the jury that defendants' alteration of evidence warranted consideration of punitive damages" for breach of contract. In its memorandum in support, however, MBI offers no argument to justify its request for new trial on this issue. Moreover, when the Court

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[6] MMS states that it does "not oppose MBI's motion for pre-judgment interest, calculated from August 1, 1994, on whatever part of MBI's contract damages is ultimately upheld, provided MMS is awarded pre-judgment interest as well." Memo. in opp. at 43 (emphasis in original). Of course, MMS's demand for a quid pro quo is not recognized by Ohio law as a prerequisite to an award of pre-judgment interest.

met with the parties to discuss its proposed jury instructions, MBI raised no objection to the Court's proposed instruction regarding the measure of damages for breach of contract. Trial transcript at 4441-42. Also, when the Court asked for objections regarding the proposed jury instruction on punitive damages in connection with MBI's fraud claim, MBI did not object -- even though the instruction ended with these sentences: "I emphasize that you may only consider an award of punitive damages to the extent you believe such an award is appropriate in connection with MBI's fraudulent inducement claim. Punitive damages may not be awarded in connection with a breach of contract claim." Accordingly, MBI's request for a new trial on this issue is denied.

C. Amend the Award of $289,000 to Include Pre-Judgment Interest.

MBI argues that the Court should amend the jury award of $289,000 in fraud damages to include pre-judgment interest, running from the date of the fraudulent inducement (October 15, 1993) through the date of judgment entry. The propriety of awarding pre-judgment interest on damages awarded for a tort is governed by Ohio statute:

> interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct . . . shall be computed . . . from the date the plaintiff filed a complaint to commence the civil action until the date that the judgment, decree, or order for the payment of the money is rendered . . . if, upon motion of any party to the civil action, the court determines . . . that the party

> required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case.

Ohio Rev. Code §1343.03(C)(1). The Ohio Supreme Court has explained this statute by stating that a party

> has not "failed to make a good faith effort to settle" under R.C. § 1343.03 (C) if he has (1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party. If a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer.

Kalaine v. Smith, 495 N.E.2d 572, 574 (Ohio 1986).

In this case, both MBI and MMS did participate in settlement negotiations, although the parties' positions during these negotiations were sometimes difficult for the Court to understand. Further, both parties firmly believed, based on some valid evidentiary and legal support, that they would prevail on the fraudulent inducement claims in plaintiffs' complaint. Indeed, MBI does not seriously dispute these facts. Rather, MBI primarily rests its argument that it is entitled to pre-judgment interest based on MMS's serious

discovery failures, which unnecessarily delayed these proceedings, as the Court discussed at length in its April 26, 1996 Order.

The Court finds, however, that an award of pre-judgment interest on MBI's fraud damages would doubly penalize MMS for its discovery failures. Ohio Rev. Code § 1343.03(C) "was enacted to promote settlement efforts, to prevent parties who have engaged in tortious conduct from frivolously delaying the ultimate resolution of cases, and to encourage good faith efforts to settle controversies outside a trial setting. Kalain, 495 N.E.2d at 574. Given that the Court has already imposed sanctions against MMS, in favor of MBI, for having delayed resolution of this case through abuse of the discovery process, the Court finds that imposition of an award of pre-judgment interest on MBI's fraud damages would be excessive, and unnecessary to advance the interests promoted by the statute. Accordingly, MBI's motion to amend the $289,000 damage award to include pre-judgment interest is denied.

D. Grant a New Trial Regarding Fraud Damages to Allow Punitive Damages.

Again, MBI argues in its motion that the Court "committed legal error by failing to instruct the jury that defendants' alteration of evidence warranted consideration of punitive damages" for fraudulent inducement. In its memorandum in support, however, MBI offers no argument to justify its request for new trial on this issue. Moreover, when the Court met with the parties to discuss its proposed jury instructions, MBI raised no objection to the Court's proposed instruction regarding punitive damages based on

fraud. Trial transcript at 4455-63.[7] Accordingly, the Court denies MBI's request for a new trial on this issue.

E. Reverse the Verdict on RS&J's Breach of Contract Claim.

Regarding RS&J's claim for breach of contract, which the jury rejected, RS&J asks the Court to enter judgment in its favor notwithstanding the verdict, or grant a new trial. RS&J argues that the evidence and the law supporting its third-party beneficiary breach of contract claim are so strong that a reasonable jury could only conclude RS&J was entitled to

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[7] When the parties discussed the proposed jury instruction regarding punitive damages for fraud, MMS objected that alteration of evidence was not a basis for punitive damages. The Court overruled this objection, based in part on arguments made by MBI in briefs submitted during trial, and in part on the Court's previous opinion in the related case of Medical Billing, Inc. v. Medical Management Sciences, Inc., no. 96-CV-1015 (N.D. Ohio Oct. 21, 1996) (affirmed on appeal). See trial transcript at 4457-62. MBI, however, did not object that the wording of the instruction was faulty for failing to positively state that alteration of evidence warranted the jury's consideration of punitive damages; in fact, MBI did not object to the punitive damages instruction on any basis. MBI was free, under the standards enunciated in the punitive damages instruction as given, to argue to the jury that defendants' destruction and alteration of evidence was one of the factors that justified the imposition of punitive damages. That MBI may have failed to do so, or failed to make its point adequately to the jury when it did, does not render the Court's punitive damage instruction erroneous.

recover on its claim. Essentially, RS&J argues that the jury's verdict is against the manifest weight of the evidence. The Court finds, however, that there existed evidence sufficient to create an issue of fact for the jury on this claim, and that a jury could properly find for MMS on this claim when applying the correct legal standard. Although there was admittedly strong evidence presented in support of RS&J's characterization of itself as an intended beneficiary of the MBI/MMS agreements, there was also evidence to the contrary. Construing the evidence and all permissible inferences most strongly in favor of MMS, a reasonable jury could reach the conclusion it did. The parties chose to structure their agreement solely as one between MBI and MMS, with obligations and rights flowing only between those entities. It was not unreasonable for the jury to give effect to that structure. Accordingly, RS& J's motion for judgment as a matter of law, notwithstanding the verdict, is denied. Further, the Court finds there is competent and sufficient evidence in the record to support the jury's determination, and the jury's verdict on this claim is neither unreasonable nor against the great weight of the evidence. Accordingly, the motion for new trial on this claim is also denied.

F. Reverse the Court's Ruling on RS&J's Fraud Claim.

As noted, the Court refused to instruct the jury that RS&J could recover on a claim against the defendants for fraudulently inducing MBI to retract its October 15, 1993 termination of the Billing Services Agreement. The Court essentially held that, as a matter of law, RS&J could not claim it was induced to enter into an agreement to which it was not a party -- even if RS&J had some status as a third-party

beneficiary to the MBI/MSS contracts. RS&J now moves the Court for judgment as a matter of law or a new trial on this claim.

The first basis for RS&J's motion is that the Court dismissed its fraudulent inducement claim without adhering to the procedural requirements of Tingler v. Marshall, 716 F.2d 1109 (6th Cir. 1983). RS&J characterizes the Court's action as a sua sponte dismissal of its fraudulent inducement claim during the charging conference, and argues it never received notice and an opportunity to be heard before this dismissal. This argument fails for the simple reason that RS&J presented argument to the Court during the charging conference after the Court stated it believed RS&J could not prevail on its fraudulent inducement claim as a matter of law; MMS also presented argument on this issue. See trial transcript at 4398-4403. Thus, RS&J cannot show it was deprived of due process before the Court dismissed its fraudulent inducement claim.

The second basis for RS&J's motion is that the Court was incorrect in concluding that RS&J could not prevail on a claim of fraudulent inducement as a matter of law. The Court disagrees. It is clear under Ohio law that a person who is not a party to a contract "has no standing to assert fraud or misrepresentation in its inducement." In re Miller, 399 N.E.2d 1262, 1265 n.4 (Ohio 1980). See also Kruso v. International Teleph. & Telegraph Corp., 872 F.2d 1416, 1426-27 (9th Cir. 1989), cert. denied, 496 U.S. 937 (1990) (the court agreed with defendants that "because none of the plaintiffs were parties to any of the alleged agreements, they have no standing . . . to sue for fraudulent inducement").

Thus, the Court declines to grant RS&J's motion for judgment as a matter of law or for a new trial on this claim.[8]

Before turning to MBI's next request, the Court adds the following observation. In its post-judgment briefs, RS&J suggests it did not claim in its amended complaint that MMS fraudulently induced it to retract its termination of the agreements (to which it was admittedly not a party). Rather, RS&J suggests it claimed MMS fraudulently induced it to continue using MBI as its billing agent, when it would not have done so if MMS had not falsely reassured it that the billing, services MMS was providing to MBI were competent. In other words, RS&J now claims MMS fraudulently induced it to continue being an MBI client, when it would otherwise have used another billing service.

Although these allegations might state a claim as a matter of law, RS&J never actually made this claim in its amended complaint. See amended complaint at ¶¶44-53 (repeatedly alleging that MMS's representations to MBI and RS&J "induced MBI to retract its termination"). Indeed, such a claim would properly be characterized as a claim for "fraud" or "fraudulent misrepresentation," not "fraudulent inducement." Simply, RS&J never stated a claim in its

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[8] Furthermore, to at least some extent, RS&J's fraudulent inducement claim apparently depends on its status as a third-party beneficiary to the Billing Services Agreement. The jury concluded, however, that RS&J was not an intended beneficiary of the Billing Services Agreement. Jury interrog. no. 2(b). Thus, RS&J apparently has no factual basis for its fraudulent inducement claim, either.

amended complaint for the type of fraud it asserts this Court "dismissed" sua sponte. Thus, the Court finds its refusal to instruct the jury on a claim that MMS "fraudulent induced" RS&J to remain a client of MBI was correct.

G. Reverse the Verdict on MMS's Counterclaim for Breach of the Asset Purchase Agreement.

This is the central argument of plaintiffs' motion. The jury determined that MBI breached the Asset Purchase Agreement and awarded MMS $1,868,000 in damages, representing "repayment of a portion of the $2.7 million paid to MBI in October of 1992." MBI now moves the Court for judgment as a matter of law (notwithstanding the verdict) or a new trial on this counterclaim. Alternatively, MBI seeks remittitur. For the reasons below, the Court grants MBI's motion for judgment as a matter of law on this claim, notwithstanding the jury's verdict.[9]

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[9] MMS is incorrect when it asserts that MBI waived its right to request relief from this portion of the judgment by not earlier seeking judgment as a matter of law. MBI continually argued that it was entitled to judgment as a matter of law on MMS's counterclaim seeking a return of the "unamortized" portion of the $2.7 million purchase price -- from its Rule 56 motion, to its motions in limine, and through its arguments at the charging conference. The Court always proceeded on the assumption that MBI's request for judgment as a matter of law on this critical issue was and remained "on the table," and the Court expressly stated that it believed that issue could be, and presumably would be, revisited post-judgment.

1. MBI's Earlier Motion for Summary Judgment

The Court begins the explanation of its rationale by returning to the very first time MBI sought judgment as a matter of law on MMS's counterclaims for breach of contract. Relatively early in this case, MBI moved for summary judgment on, among other claims, that part of MMS's first counterclaim that asserted breach of the Asset Purchase Agreement. See docket no. 41 (plaintiffs' motion for partial summary judgment). Specifically, count I of MMS's counterclaims alleged that MBI breached the Billing Services Agreement and also the Asset Purchase Agreement. MBI's motion for summary judgment sought judgment as a matter of law only on that part of MMS's counterclaim that alleged MBI breached the Asset Purchase Agreement. MMS's counterclaim relative to the Asset Purchase Agreement was an especially critical claim against MBI, because it put at risk some or all of the $2.69 million MMS had paid MBI under that contract, in exchange for MBI's covenant not to compete against MMS.[10]

The essential basis for MBI's motion was that the Asset Purchase Agreement and the Billing Services Agreement were completely separate contracts. MBI argued that, given this independence, even if it had breached the Billing Services Agreement, that breach could not and did not

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[10] MMS paid MBI a total of $2.7 million under the Asset Purchase Agreement. Of this total amount, $2.69 million was explicitly earmarked as consideration in exchange for MBI's covenant not to compete against MMS.

constitute a breach of the Asset Purchase Agreement. MBI added that the undisputed facts revealed it had not separately breached the Asset Purchase Agreement directly (that is, MBI had never breached its covenant not to compete against MMS). MBI thus concluded that there existed no evidence to show it breached the Asset Purchase Agreement, and MMS had no valid claim on the $2.69 million it had paid to MBI.

The Court denied MBI's motion for summary judgment on this issue. The Court found that the two agreements had to be "viewed collectively, and that together they represent the entire agreement between the parties." Final pretrial conference transcript at 8 (Oct. 23, 1995). The Court concluded that "there is a sufficient ambiguity with respect to whether the [two] contracts were intended to be tied together [only] for purposes of execution or [instead also] for purposes of performance, to leave open a genuine issue of material fact with respect to the way that the two documents were supposed to interact." Id. at 9.

At the same time the Court addressed MBI's motion for partial summary judgment, the Court also addressed a motion in limine filed by MBI (docket no. 65). This motion in limine sought, among other things, a ruling excluding parol evidence relating to the Asset Purchase Agreement. Specifically, MMS sought to adduce parol evidence tending to show that the $2.7 million it paid to MBI in consideration for the Asset Purchase Agreement was also consideration for the six-year Billing Services Agreement. The Court denied MBI's motion to exclude this evidence, stating: "there are, I believe, some overwhelming ambiguities with respect to the parties' obligations under the two agreements and how these agreements are to interact. So it is this Court's intention to

deny the motion in limine to the extent that it relates to the Asset Purchase Agreement and the parties' intentions with respect to the Asset Purchase Agreement." Id. at 21. The Court went on to comment on its own evidentiary ruling: "I understand that this is a fairly dramatic decision. If I'm wrong, it could reverse the whole trial; but if I'm wrong the other way, it . . . could reverse it the other way. So I struggled with this one to some extent, and it is my conclusion that it's more appropriate to allow the evidence in than to exclude it." Id. at 21-22. This comment now proves to be prophetic.[11]

2. The Evidence on Summary Judgment.

When the Court reviewed MBI's motion for summary judgment on MMS's counterclaim for breach of the Asset Purchase Agreement, the primary evidence before the Court consisted of the parties' contracts themselves. The language contained in these agreements, of course, must be the starting point for any analysis of a claim of breach of contract.

As revealed by the first five paragraphs of the Asset Purchase Agreement, the parties agreed that: (1) MBI would sell to MMS certain furniture and equipment, but not accounts

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[11] Although the Court did not base its decision on this factor, one benefit of having allowed introduction of the parol evidence at trial is that the Court of Appeals now has a full record upon which to rely in reviewing this Court's rulings. Thus, if the Court of Appeals reverses this Court's decision on this issue, this Court can simply reinstate the jury's verdict; no new trial is necessary.

receivable and computer equipment (¶¶1&2); (2) MBI and MMS would enter into a separate six-year Billing Services Agreement (¶3); (3) MBI would not compete with MMS, for six years, in the business of providing billing and collection services to radiology firms (¶4); and (4) MMS would sublease certain office space from MBI (¶5). Regarding the covenant not to compete, the Asset Purchase Agreement provided: "This Covenant Not-To Compete is the essence of the value of this agreement to MMS. Of the $2,700,000 payable hereunder, $2,690,000 is being paid for the Covenant Not To Compete." Agreement at ¶4. Schedule 9 of the Asset Purchase Agreement, titled "Allocation of Purchase Price," added the following breakdown:

Covenant Not To Compete in any radiology billing services activity by MBI, its Shareholders, officers and other principles.	$2,690,000
Certain used office furniture.	10,000
TOTAL PURCHASE PRICE	$2,700,000

Notably, the Asset Purchase Agreement did not allocate any of the $2.7 million purchase price as consideration for MBI's promise to enter into the separate six-year Billing Services Agreement.

A primary basis for this allocation of the purchase price was the tax consequences which would flow from it. The Asset Purchase Agreement dictated that

> [a]ll tax returns and reports filed by [MMS] and [MBI] with respect to the purchase and sale of the Purchased Assets and the Covenant Not To Compete shall be prepared on a basis consistent with such allocation, including, but not limited to, the preparation and submission to the Internal Revenue Service of Form 8594 in accordance with Section 1060 of the Internal Revenue Code of 1986, as amended.

Agreement at ¶9. This provision was designed to take advantage of the federal tax rule that the buyer of an intangible asset (e.g., a covenant not to compete) can amortize the value of the asset over its useful life. See Patterson v. Commissioner of Internal Revenue, 810 F.2d 562, 569 (6th Cir. 1987) ("[i]t is well-settled that any consideration genuinely paid for a covenant not to compete forms the cost basis of a fixed-life, depreciable, intangible asset which yields an amortizable deduction to the buyer for the life of the covenant") (citing Treas. Reg. §1.167(a)-3). Thus, MMS deducted a total of about $750,000 from its taxable income on its 1992 and 1993 federal tax returns, as depreciation of the covenant no to compete. No similar tax benefit accrued to MBI from this purchase price allocation.

In addition to these provisions, the Asset Purchase Agreement contained an integration clause. This clause stated:

> This Agreement sets forth the entire agreement and understanding between the parties as to the subject matter of this Agreement and merges or supersedes all prior discussions, agreements

> and undertakings of every kind and nature between them with respect to the subject matter of this Agreement, and neither party to this Agreement may be bound by any condition, definition, warranty or representation other than expressly provided for in this Agreement.

Agreement at ¶12(b).

Turning to the Billing Services Agreement, this contract generally provided that MMS would provide MBI with billing and collection services for each of MBI's clients, in exchange for a share of the collected revenue. Agreement at ¶2. The Billing Services Agreement had a term of six years. Id. at ¶8(a). Just as the Asset Purchase Agreement referred to the Billing Services Agreement, so did the Billing Services Agreement refer back to the Asset Purchase Agreement.[12] Specifically, the Billing Services Agreement stated in the recitals that "[i]n partial consideration for the Asset Purchase Agreement, MBI desires to retain certain services from MMS, and MMS desires to provide comprehensive billing and collection services to MBI on behalf of MBI Clients." Agreement, Recital D (emphasis added). Like the Asset Purchase Agreement, the Billing Services Agreement contained a broad integration clause. Id. at.¶12(d).

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[12] The Billing Services Agreement refers to the Asset Purchase Agreement 4 times, while the Asset Purchase Agreement refers to the Billing Services Agreement 21 times.

As noted above, MMS's first counterclaim was that MBI "breached the [Asset] Purchase Agreement by. . . terminat[ing] . . . the Billing [Services] Agreement . . . because the [Asset] Purchase Agreement was contingent upon performance under the Billing [Services] Agreement." Amended counterclaims at ¶14. MMS argued at the summary judgment stage that "[w]hile [MBI] contend[s] that $2.69 million of the $2.7 million purchased only a covenant not to compete, the $2.69 million actually purchased not only the six year covenant not to compete, but the entire billing relationship." Response brief at 4. Thus, MMS concluded, "[a] pro rata portion of the [$2.69 million] purchase price was to be returned [to MMS] upon the termination of the parties' relationship prior to the expiration of the [six-year] term" of the Billing Services Agreement. Id. Put differently, MMS argued that "the [Asset Purchase Agreement] and the payment of the $2.7 million were conditioned upon the performance, not merely the execution, of the [Billing Services Agreement]." Id. at 3 (emphasis in original).

Given the evidence then before it, the Court agreed with MMS that there was a material issue of fact in dispute -- to repeat, the Court found there was "a sufficient ambiguity with respect to whether the [two] contracts were intended to be tied together [only] for purposes of execution or [instead also] for purposes of performance, to leave open a genuine issue of material fact with respect to the way that the two documents were supposed to interact." Final pretrial conference transcript at 9. Thus, the Court denied MBI's motion for partial summary judgment on MMS's counterclaim for breach of the Asset Purchase Agreement, and allowed MMS to present parol evidence to explain how the parties meant the two contracts to interact.

3. The Evidence at Trial.

At trial, MMS did not offer any evidence or argument that MBI breached the Asset Purchase Agreement directly, through breach of the covenant not to compete. Rather, MMS's theory before and during trial has always been that: (1) MMS's $2.7 million payment to MBI under the Asset Purchase Agreement was contingent on MBI's performance under the Billing Services Agreement for the full six years; and (2) MBI breached the Asset Purchase Agreement by failing to repay some portion of the $2.7 million purchase price when it terminated the Billing Services Agreement early.[13]

MMS's argument depended heavily on its version of the parties' contractual intent. Because MMS was successful in convincing the Court, at the summary judgment stage, that the contracts were ambiguous on the question of whether the $2.69 million MMS paid to MBI in consideration for the covenant not to compete contained in the Asset Purchase Agreement was also consideration for allowing MMS to perform for the entire six-year Billing Services Agreement, the Court allowed MMS to present parol evidence of the parties' contractual intent.

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[13] MMS's argument regarding its right to a return of some portion of its purchase price did not depend on its contention that the Billing Services Agreement was "wrongfully" terminated by MBI. Instead, MMS argued at all times that it was entitled to a return of the effectively unearned portion of the purchase price if the parties did not continue their relationship for a full six years, regardless of the reason for the termination of that relationship.

The parol evidence presented at trial included testimony by MMS's former chairman, defendant Thacker, and MMS's president, defendant DeZonia, that the parties all intended the $2.7 million to be an up-front investment in exchange for 15% of MBI's clients' billing collections over six years. MMS showed the mathematical calculations it used to support the amount of this up-front investment. Thacker and DeZonia further testified that the parties all contemplated that, if their relationship terminated early for any reason, MBI would return a portion of this $2.7 million. Evidence was adduced that, when the parties were negotiating the Asset Purchase Agreement and Billing Services Agreement -- that is, before the final contract documents were signed -- they discussed the issue of the $2.7 million being consideration for the full six-year term of the Billing Services Agreement.

The parol evidence adduced at trial was not all supportive of MMS's position, however. For example, during negotiations, MBI stated it believed it needed assurances from a bank that it would receive from MMS the minimum revenue payments guaranteed by the Billing Services Agreement. In response, MMS wrote to MBI that "MMS will be at risk of termination of the billing agreement and consequential loss of the $2.5 million purchase price, if the guarantee is not honored. Therefore, it would seem no third-party assurances are warranted." A follow-up letter reiterated this position: "As previously discussed, the Letter of Credit should be irrelevant in that MMS would be in default and forfeit $2.5 million if any guarantee shortfall is not promptly paid."[14] These statements clearly reflect MMS's

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[14] The $2.5 million price was later changed to $2.7 million, with $2.69 million allocated as consideration for the

belief, communicated to MBI, that the purchase price was not tied to the successful completion of the Billing Services Agreement.

In addition to this parol evidence, the parties also introduced at trial evidence of how MMS characterized $2.69 million of the $2.7 million payment after signing the Asset Purchase Agreement. This evidence showed that MMS repeatedly characterized its $2.69 million payment as having been made solely in exchange for a covenant not to compete. For example, MMS repeatedly avowed to the Internal Revenue Service, under oath, that the $2.69 million was the price it paid solely in exchange for the covenant not to compete. Based on this characterization, MMS deducted a total of about $750,000 from its taxable income on its 1992 and 1993 federal tax returns. MMS never suggested to the Internal Revenue Service that any part of the $2.69 million was refundable if the Billing Services Agreement terminated before its six-year natural term. Furthermore, after MMS and MBI terminated their relationship, MMS deducted the unamortized remaining cost of the covenant not to compete (about $1,876,000) from its taxable income on its 1994 federal tax return. Again, MMS never suggested to the Internal Revenue Service that any part of the $2.69 million was refundable if the Billing Services Agreement terminated early. To the extent $2.69 million of the $2.7 million purchase price was refundable, of course, the propriety of MMS's tax deductions are suspect.

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covenant not to compete.

Another example of MMS's course of conduct after signing the Asset Purchase Agreement and Billing Services Agreement was its description of the covenant not to compete to its own shareholders and to the public. In its 1993 public financial statements, MMS stated that "In accordance with the [Asset Purchase Agreement], $2,690,000 was assigned as the purchase price of a six-year covenant not-to-compete." In its "first version" of its 1994 financial statements, MMS wrote the same thing. After MBI requested copies of the 1993 and 1994 financial statements during discovery, however, MMS destroyed the first version of its 1994 financial statements and issued new statements declaring that, "[i]n accordance with the [Asset Purchase Agreement], $2,690,000 was assigned as the purchase price of a six year billing contract and covenant not-to-compete" (emphasis added). The Court has earlier concluded that "[1] the changes to . . . the 1994 financial statement were made so that [the statement] would reflect a position that was consistent with the position MMS is taking in this litigation; [2] before [it was] changed, . . . the 1994 financial statement [was] consistent with MBI's claims; [and] [3] [the financial statement was] changed after consultation with and in a manner that reflects the advice of [former counsel for MMS]." Order at 4 (Apr. 26, 1996) (docket no. 131). Essentially, after the Billing Services Agreement and the Asset Purchase Agreement were executed, MMS never publicly took the position that any part of the $2.69 million was refundable, until this litigation ensued.

A third example of MMS's course of conduct after signing the Asset Purchase Agreement and Billing Services Agreement was MMS's attempt to modify the agreements in 1993. In August of 1993, MBI notified MMS of its intent to terminate the Billing Services Agreement. In response, MMS

met with MBI in September of 1993 and suggested the parties could patch up their relationship by entering into an "amended and restated agreement." During this 1993 negotiation, MMS stated it was willing to revise the Billing Services Agreement to address MBI's concerns, but only if MMS could insert a new stipulation, or "trigger," providing that MBI would return a portion of the $2.69 million if the amended contracts terminated for any reason. In several letters, MBI indicated a willingness to include this "trigger" provision in a new agreement. Thacker and DeZonia testified that, during MMS's 1993 negotiations with MBI, MBI stated it "felt an obligation" to refund part of the $2.69 million to MMS. There is no evidence, however, that MBI believed that obligation was contractual. Further, it is undisputed that the parties never entered into any amended agreement. And, at trial, defendant Thacker conceded that the "trigger" provision it sought in 1993 was not in the original Asset Purchase Agreement or Billing Services Agreement. Trial transcript at 3955. MMS's conduct during the 1993 negotiations shows clearly that it did not believe it had an existing contractual right to a refund of any of the $2.69 million payment. Further, MBI's conduct during the 1993 negotiations does not suggest otherwise.[15]

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[15] MMS relies heavily on letters written by MBI's counsel, Anthony LaPlaca, during the 1993 negotiations, in which Mr. LaPlaca indicated a willingness on MBI's part to make a "pro rata" repayment of the $2.69 million purchase price upon termination of the Billing Services Agreement "with or without cause." That MBI was willing to agree to such an arrangement in 1993 does not prove that a binding agreement to that effect existed previously. If fact, that the parties were even discussing insertion of such a "trigger" into a renegotiated agreement, that would also

4. Judgment Notwithstanding the Verdict.

Initially, the Court notes that it is not unusual for a court to enter judgment as a matter of law after a full trial, even though the same Court denied summary judgment on the same issue before trial. This is because "the Rule 50 decision is based on the complete trial record and not the incomplete pretrial record available at summary judgment." K&T Enterps. v. Zurich Ins. Co., 97 F.3d 171, 174 (6th Cir. 1996) (quoting Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp., 51 F.3d 1229, 1236 ((4th Cir. 1995)). As the First Circuit Court of Appeals explained,

> [a] denial of summary judgment does not preclude a directed verdict on the same claim. Evidence adduced at trial will almost always differ in degree, force, and quantity from that submitted on a motion for summary judgment. The earlier denial of summary judgment standing alone in no way impeaches the later directed verdict.

Thorpe v. Mutual of Omaha Ins. Co., 984 F.2d 541, 545 (lst Cir. 1993) (citations omitted); see also 9A Wright & Miller, Federal Practice & Procedure §2532 at 307-08 (1995) ("judgment as a matter of law at the close of all the evidence may be proper in a case in which summary judgment was

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have given MBI some additional assurances and concessions, is strong evidence that both parties believed no such "trigger" previously existed -- at least not in the form of a legally binding, validly executed written agreement.

denied"); 9 Moore's Federal Practice §50.09[3] at 50-31 n.5 (3rd ed. 1997) ("[d]enial of summary judgment does not preclude granting of judgment as a matter of law"); Cottrell v. Caldwell, 85 F.3d 1480, 1487-88 (11th Cir. 1996) (noting this is especially true when the motion for summary judgment turns on factual issues relating to qualified immunity).

In this case, there are various grounds upon which the Court arguably could base its decision to grant judgment in favor of MBI on MMS's counterclaim for breach of the Asset Purchase Agreement, notwithstanding the jury's verdict, even after having denied MBI's motion for summary judgment on the same issue before trial. First, the jury concluded both that: (1) MBI breached the Asset Purchase Agreement by not refunding some portion of the purchase price upon termination of the Billing Services Agreement; and (2) MMS fraudulently induced MBI to continue their relationship under the Billing Services Agreement after October 1993. Jury interrog. nos. 4 & 3. It is arguable, however, whether MBI can be deemed to have breached a contract that it was fraudulently induced to enter (or reenter). See, e.g., Bazzano v. L'Oreal S.A., 1996 WL 254873 at *3 (S.D.N.Y. May 14, 1996) ("where a party is fraudulently induced to enter into a contract, the contract is voidable at the instance of the defrauded party"). Because neither party addresses this question in its post-judgment briefs, however, and because the right to avoid a voidable contract can be waived under certain circumstances, the Court does not rely on this ground.

Second, it is possible that MMS should be judicially or equitably estopped from asserting the position, in this case, that the $2,690,000 it paid to MBI was anything other than consideration for the covenant not to compete contained in the

Asset Purchase Agreement. In its verified federal tax returns and its public financial statements, produced well after the parties signed the Billing Services Agreement and Asset Purchase Agreement, MMS repeatedly characterized its $2.69 million payment to MBI as consideration only for the covenant not to compete. It is possible that this action should serve to estop MMS from asserting in this litigation the position that the $2.69 million payment was actually consideration for "the entire billing relationship," which would conveniently allow MMS to recoup some of its payment, despite its full "depreciation." It is difficult to understand how MMS, in good faith, can make these two contradictory statements, both under oath, and perhaps it should be estopped from doing so. "[O]nce a party has taken a position under oath, 'a court has the right, if not the duty, to hold [that party] to th[at] position, . . . by assuming in his behalf utter good faith in the first instance, to reproduce such assumption later, even to his hurt.'" Rand Boyers, Comment, Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel, 80 Nw. U. L. Rev. 1244, 1254 (1986) (citation omitted). See Reynolds v. Commissioner of Internal Revenue, 861 F.2d 469, 472 (6th Cir. 1988) (applying doctrine of judicial estoppel); Specialized Systems, Inc. v. United States, 792 F. Supp. 577, 578 (M.D. Tenn. 1992) (applying doctrine of equitable estoppel in tax case); see also North American Rayon Corp. v. Commissioner of Internal Revenue, 12 F.3d 583, 589 (6th Cir. 1993) (when "the allocation of purchase price in [an] asset purchase agreement is unambiguous," the allocation is binding for tax purposes). The parties have addressed this inconsistency to some extent in their post-judgment briefs, but not in the context of estoppel. For this reason, and because it is unclear to what extent, if any, the concept of judicial estoppel can be applied

where the prior sworn statement, though "under oath," was not made in a judicial or quasi-judicial setting, the Court does not rely on this ground, either.

MBI argues that a third possible ground for entering judgment as a matter of law in favor of MBI is that MBI cannot be deemed to have breached a contract which it had an absolute right to terminate. The jury concluded that the Billing Services Agreement continued in force until August 1, 1994. Jury interrog. no. 1. It is undisputed that MMS did not pay any guaranteed "shortfall" to MBI when it was due on January 10, 1994. Under the unambiguous terms of the Billing Services Agreement, this nonpayment gave MBI the fight to terminate the parties' relationship: the Billing Services Agreement gave MBI the right of termination if MMS "default[ed] in the performance of any warranty, obligation, covenant, or other provision" contained in the Billing Services Agreement or Asset Purchase Agreement, "and such default shall continue unremedied for twenty (20) days after written notice thereof." Billing Services Agreement at ¶8(b)(vi, vii). MBI gave MMS timely written notice of its failure to pay the guaranteed shortfall; thus, MBI clearly had the right to terminate the Billing Services Agreement as of February of 1994. Given this right, MBI argues it cannot be deemed to have "breached" any agreement, including the Asset Purchase Agreement, by virtue of having terminated the Billing Services Agreement.

This argument misconstrues the theory under which MMS argues (and argued to the jury) it was entitled to a return of some portion of its $2.7 million, however. MMS does not contend that MBI was obligated to return a portion of the purchase price because MBI's termination of the Billing

Services Agreement was wrongful; MMS does not believe that a precondition to a return of funds was a breach of the Billing Services Agreement. MMS contends, instead, that the failure to return a portion of the purchase price upon any termination of the Billing Services Agreement, even one expressly authorized by the Billing Services Agreement constitutes a breach of the Asset Purchase Agreement. That is, MMS contends that even an appropriate early termination of the Billing Services Agreement by MBI -- not merely an inappropriate breach of the Billing Services Agreement -- also works to breach the Asset Purchase Agreement. Given MMS's theory, MBI's argument misses the mark. MMS never tied its argument that MBI breached the Asset Purchase Agreement to a claim that MBI "breached" the Billing Services Agreement; the Court, accordingly, may not presuppose that the jury improperly did so.[16] The Court, thus, does not find MBI's argument compelling and does not rely upon this ground to enter judgment in MBI's favor. The

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[16] While the jury did conclude that MBI breached the Billing Services Agreement, the jury's damage award on that finding makes it clear that the jury based its conclusion entirely on MBI's failure to make all service fee payments due under the Billing Services Agreement prior to August 1, 1994 -- not on a conclusion that MBI's decision to terminate the agreement was improper. The jury, thus, concluded that MBI's breach of the Billing Services Agreement predated the termination on August 1, 1994. MMS's theory regarding breach of the Asset Purchase Agreement assumes MBI breached that agreement on or after August 1, 1994, when it refused a reimbursement demand from MMS.

Court instead, relies upon a different, fourth ground, to enter judgment as a matter of law in favor of MBI.

The ground upon which the Court relies is that, based only upon admissible evidence, no reasonable jury could conclude in favor of MMS on its counterclaim for breach of the Asset Purchase Agreement. "Admissible evidence," as used here, does not include the parol evidence regarding the parties' contractual intent which the Court admitted at trial pursuant to its earlier ruling denying MBI's motion in limine. "Admissible evidence" does include the language of the contracts themselves, and the parties' course of conduct alter signing the contracts. Viewing this admissible evidence alone, the Court finds there is no ambiguity as to the parties' contractual intent, and MBI is entitled to judgment as a matter of law.

The parol evidence introduced by the parties at trial, discussed above, was somewhat equivocal: some of this evidence suggested that the parties intended the $2.7 million to be a refundable, up-front payment in exchange for the right to perform billing services for six years at a premium billing rate; some of this evidence suggested, however, that the parties finally agreed that MMS would pay MBI $2.69 million of the $2.7 million purchase price solely in consideration for the covenant not to compete. Thus, some of the parol evidence indicated that, at least by the time the contract was executed, MMS agreed, in return for a premium billing rate and favorable tax consequences, to assume the risk that it would not receive a return of its purchase monies in the event it gave MBI legitimate grounds to terminate the Billing Services Agreement. Given this conflict in the evidence, it is understandable that the jury could conclude as it did -- relying

on this parol evidence, the jury adopted MMS's version of the conflicting evidence and, hence, of the parties' contractual intent. Unfortunately, in so doing, the jury relied upon evidence the Court should not have allowed it to consider.

Ohio has codified the parol evidence rule at Ohio Rev. Code § 1302.05. This statute states:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or a contemporaneous oral agreement but may be explained or supplemented . . . by course of dealing or usage of trade . . . or by course of performance. . . .

Ohio Rev. Code §1302.05(A). This statute makes clear that, to the extent a fully integrated contract is ambiguous, a Court should look first to evidence of the parties' course of dealing or course of conduct to explain the ambiguity. Only if the ambiguity remains may a Court turn to (or allow the jury to turn to) parol evidence to discern the parties' intent, and even then the parol evidence may not be used to contradict or rewrite the agreement's terms.

In this case, the evidence regarding MMS's course of conduct after it signed the Asset Purchase Agreement and Billing Services Agreement, considered alone, fully explains the parties' contractual intent. MMS repeatedly and publicly

treated the $2.69 million payment it made to MBI under the Asset Purchase Agreement as consideration only for the covenant not to compete contained in the Asset Purchase Agreement. MMS never treated the $2.69 million payment as consideration for the right to perform for the full term of the separate Billing Services Agreement -- at least, not until this litigation. Indeed, the evidence at trial showed that MMS: (1) conceded the original agreements with MBI did not give MMS a right to any proportional refund of the $2.69 million; and (2) attempted to negotiate a modified agreement with MBI to obtain this right. These actions clearly "explain" the intentions of the parties in the original agreements, to the point that there remains no ambiguity that must be resolved through consideration of parol evidence. When the Court denied summary judgment to MBI, it did so because it found there was an ambiguity regarding whether the parties meant the Asset Purchase Agreement and the Billing Services Agreement to be "tied together for purposes [only] of execution or [instead also] for purposes of performance." Final pretrial conference transcript at 9 (Oct. 23, 1995). The evidence of MMS's actions after it signed the contracts, however, demonstrates clearly that the parties intended the agreements to be tied together only for purposes of execution.

Further, the Court finds that the parol evidence relied upon by MMS contradicts the language of the parties' fully integrated agreements and would require a rewriting of those agreements. The Asset Purchase Agreement and the Billing Services Agreement each have an integration clause, stating that the contract "sets forth the entire agreement and understanding between the parties . . . and merges or supersedes all prior discussions [and] agreements." These clauses are strictly enforced in Ohio. Lewelling v. Farmers

Ins. of Columbus, Inc., 879 F.2d 212, 217 (6th Cir. 1989).; Armco Inc. v. Burns & McDonnell, 807 F. Supp. 65, 67 (D. Ohio 1992). The Asset Purchase Agreement allocates $2.69 million of MMS's $2.7 million payment as consideration for the covenant not to compete. The contract allocates the remaining $10,000 as consideration for certain office furniture. It does not allocate any of the $2.7 million as consideration for the right to perform under the Billing Services Agreement for the full six-year term. And, it contains no clause or language which can be construed as an obligation to repay those sums upon termination of the Billing Services Agreement, or any other agreement for that matter. While MMS believes such an obligation can be implied in order to give effect to the parties' intent, the absence of any "triggering" language is actually evidence of a contrary intent. "The total absence of a provision from a written contract is evidence of an intention of the parties to exclude it rather than of an intention to include it." Buckeye Union Ins. Co. v. Consolidated Stores Corp., 587 N.E.2d 391, 394 (Ohio Ct. App. 1990). To allow the jury to rely on parol evidence and conclude MMS had a contractual right to $1,868,000 in damages, as "repayment of a portion of the $2.7 million paid to MBI in October of 1992," is to allow the jury to rewrite the Asset Purchase Agreement in a manner contradictory to the clear terms of the contract.

MMS's argument would also require a substantial rewriting of the Billing Services Agreement. As noted above, MMS contends it is entitled to a return of some portion of the purchase price upon any termination of the Billing Services Agreement, even a legitimate one. This theory requires the conclusion that MBI's explicitly stated, absolute right to terminate the Billing Services Agreement, upon the happening

of the conditions specified, is not absolute at all. Thus, MMS contends that the Billing Services Agreement contains an implied caveat to the termination rights specified in that agreement: a caveat stating that MBI's right to terminate the Billing Services Agreement upon MMS's failure to make the payments due thereunder carries a repayment obligation along with it -- specifically, an obligation to return a portion of the monies paid under the Asset Purchase Agreement. Again, to allow the jury to rely on parol evidence to qualify MBI's termination rights, as MMS requests, is to allow the jury to rewrite the Billing Services Agreement so as to contradict otherwise clear terms of that agreement.

Indeed, to allow the jury to rely on parol evidence in this case is to allow the jury to ignore the instructions the Court gave immediately before the jury retired to deliberate. Regarding the parties' contractual intent and course of conduct, the Court instructed as follows:

> Your purpose in construing the terms of a contract is to determine and, if possible, give effect to the parties' intent as that intent is expressed in the written agreements before you in this case. In this regard, I must caution you, however, that you may not seek to give effect to a party's intention with respect to any issue if that intention is inconsistent with or cannot reasonably be gleaned from the language used by the parties in their agreements. In other words, you may not write a new agreement for the parties or even modify their agreements -- your role is to determine what the parties actually agreed to

and, if possible, reach a verdict which gives effect to that agreement.

* * *

In assessing what the parties intended by the agreements they entered into, you may consider the manner and method by which the parties performed or acted pursuant to those agreements before a dispute arose regarding them. In other words, you may look to the parties' conduct after the agreement was entered into and infer, if you deem such an inference to be reasonable, that the parties acted in accordance with their understanding of the contracts terms by which they agreed to be bound.

In attempting to determine the intent of the contracting parties, you may also consider all other facts and circumstances which you believe are relevant to and help explain (as opposed to alter) the terms of the Billing Services Agreement and the Asset Purchase Agreement.

In this regard, you may consider what the parties said, in writing and orally, the course of dealings between the parties, both before and alter the agreement, industry custom and practice at the time the agreement was entered into, and any other facts and circumstances you believe bear on the issue of

> the parties' intent at the time they entered into the agreement in this case.

Trial transcript at 4670-72.

Although the Court stated that the jury could consider parol evidence -- that is, evidence of what the parties said and did "both before and after the agreement" -- the Court cautioned the jury that they could not "write a new agreement for the parties or even modify their agreements." The Court concludes that the parties' contracts are clear on the question of whether any portion of the $2.7 million paid by MMS to MBI under the Asset Purchase Agreement was consideration for the right to perform for the entire six-year term of the Billing Services Agreement -- it was not. The jury's verdict otherwise rewrites both of the agreements between the parties, in contravention of the law and the Court's instructions.[17]

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[17] While it may be true that the parties contemplated initially that the purchase price paid by MMS would be refundable if the relationship between the parties soured, the parties never entered into a written contract to that effect. Whatever their reasons, the parties entered into a contract that contained no repayment trigger. The evidence shows that, contemporaneous with the execution of the agreements and at all times thereafter prior to this litigation, the parties understood what the documents said. MMS's theory in this case essentially asks that the contract documents be read out of the equation so as to give effect to the parties' alleged original conception of the deal. Even if this Court were to conclude that it would be "fair" to take that course, basic principles of contract law prohibit it from doing so.

In sum, the Court concludes that MBI is entitled to judgment as a matter of law on MMS's counterclaim for breach of the Asset Purchase Agreement. After considering only the evidence properly admissible at trial, the Court concludes that there is no evidence upon which the jury could properly support a verdict in favor of MMS, and reasonable minds could not come to a different conclusion. Accordingly, MBI's motion is granted, and the Court will enter a separate amended judgment to that effect. Specifically, the amended judgment will vacate the jury's verdict to the extent it awarded $1,868,000 to MMS for breach of contract, and enter judgment in favor of MBI on MMS's claim for breach of the Asset Purchase Agreement.[18]

Finally, the Court rules that, if its judgment as a matter of law is vacated or reversed, the Court declines to conditionally grant MBI's motion for a new trial on this issue. If the Court's conclusion here is wrong -- that is, if the Court of Appeals finds the jury properly relied on the parol evidence admitted by this Court and that doing so would not require an

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[18] With "perfect hindsight," the Court believes it would have granted to MBI judgment as a matter of law on this issue at the summary judgment stage, if: (1) the Court had in front of it at that time all of the testimony and evidence introduced at trial regarding MMS's treatment and characterizations of the covenant not to compete; and (2) MBI had not hinged its summary judgment argument solely on whether the Court should construe the Billing Services Agreement and Asset Purchase Agreement as separate contracts. Even construing the two contracts together, the sum of the evidence makes clear that MBI is entitled to judgment as a matter of law on this claim.

impermissible rewriting of the contract documents -- then the jury's verdict is not against the clear weight of that evidence. As noted, the parol evidence regarding the parties' intent was contradictory. Reasonable minds could reach contrary conclusions about its weight and effect. Accordingly, MBI's motion for new trial on this issue is denied.

H. Reverse the Verdict on MMS's Counterclaim for Breach of the Billing Services Agreement

The jury awarded a total of $2,093,000 in damages to MMS for breach of contract. Of this amount, $1,868,000 was awarded for breach of the Asset Purchase Agreement, as "repayment of a portion of the $2.7 million paid to MBI in October of 1992." The Court has entered judgment notwithstanding the verdict as to this award. The remaining $225,000 was awarded for MBI's breach of the Billing Services Agreement; the jury stated this award represents "unpaid service fees." Jury interrog. no. 5. As to this portion of the jury's verdict, MBI once again asks the Court to enter judgment in its favor as a matter of law, or to grant a new trial. Alternatively, MBI seeks remittitur.

The basis for MBI's argument is that there exists no evidentiary support for a calculation of $225,000 in unpaid service fees. MBI argues that: (1) MMS calculated at trial that it was owed $676,087 in service fees; (2) this calculation included $100,000 that can only be properly included if the parties terminated their relationship on October 15, 1993, which the jury concluded did not happen; (3) any such calculation had to be reduced by a "set-off" of $663,000, premised on unpaid volume bonus and guaranteed revenue

shortfall amounts; and (4) any such calculation had to be reduced by an additional amount of $31,011, representing the unpaid volume bonus for the first quarter of 1994. Thus, MBI contends the only proper "service fee" calculation is one which would result in a net award to MBI.

MBI's argument, however, depends on its own view of the evidence and on its own understanding of interrelated jury awards. Thus, MBI argues it owed MMS no service fees because it was entitled to withhold those fees against monies MBI claims it was owed under the Billing Services Agreement. While acknowledging that the jury awarded it approximately $950,000 for the very monies it claimed were due under the Billing Services Agreement, MBI rejects the notion that the jury did or could have engaged in its own calculation of service fees MBI, in turn, owed MMS. MBI argues it already gave the jury the benefit of its own "set-off" calculations when it reduced the amount it requested for unpaid volume bonus and guaranteed revenue payments under the Billing Services Agreement, and that the jury's $950,000 verdict in its favor must have been "net" of those set-offs. Thus, MBI contends the jury's failure to give it credit for those same "set-offs" in calculating whether and to what extent service fees were owed is irrational, and unsupported by the evidence.

That there exists no obvious mathematical basis for the jury's damage calculations on these interrelated claims does not render the award irrational, however. The jury easily could have chosen to issue separate awards -- one based on all available evidence regarding unpaid monies owed MBI, and a separate award based on all available evidence regarding service fees owed MMS. The jury could have rejected or

discounted MBI's calculation of its own losses and rejected MBI's assertion that all of the set-offs were properly calculated or fairly taken. A jury verdict is not suspect merely because it is inconsistent with the damage theories proffered by one, or even both, of the parties.

Construing the evidence and all permissible inferences most strongly in favor of MMS, a reasonable jury could reach the conclusion it did. Accordingly, MBI's motion for judgment as a matter of law, notwithstanding the verdict, is denied. Further, the Court finds there is competent and sufficient evidence in the record to support the jury's determination, and the jury's verdict on this claim is neither unreasonable nor against the great weight of the evidence. Accordingly, the motion for new trial on this claim is also denied. Finally, the Court does not find the jury's award to be excessive. Thus, the motion for remittitur is denied as well.

IV. Defendants' Motion for Post-Judgment Relief.

In their motion for post-judgment relief, defendants request the Court to modify the judgment in five ways. Each request is discussed separately, below.

A. Reverse the Award of $29,000 in Damages.

As noted, of the $952,000 in damages the jury found MBI suffered as a result of MMS's breach, the jury found that $29,000 represented losses "recoverable by virtue of MBI's 'recoding project.'" MMS argues that MBI failed to prove these damages, and MMS is entitled to judgment as a matter

of law on the $29,000 award. MMS explicitly does not seek a new trial if this request is denied.

At trial, MBI sought about $226,000 in fees and expenses it incurred because, it claimed, it had to "recode" and resubmit to Medicare several thousand claims for radiological procedures performed by RS&J. Of this $226,000, $29,000 was allegedly MBI's "out-of-pocket" expenses for performing the recodings; the remainder was the value of MBI employees' time spent during the project. In addition to these expenses, MBI claimed it suffered $289,000 in contract damages for the amount of Medicare reimbursement it allegedly lost because it was unable to timely file its claims with Medicare. The recoding project resulted in MBI recovering about $250,000 in revenue.

The jury apparently awarded MBI its out-of-pocket expenses for the recoding project, but not any other expenses, nor any lost revenue attributable to non-reimbursement by Medicare. The jury's decision not to award damages for lost revenue is completely justified, given that MMS presented evidence at trial that its actions did not prevent MBI from timely filing its claims with Medicare.[19] On the other hand, since MBI's recoding efforts did result in recovery of over $250,000 in revenue, the jury's decision to award a portion of MBI's recoding costs as damages is also justified.[20]

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[19] MMS also proffered evidence at trial indicating that MBI's "recoding" was either unnecessary or improper given then-current Medicare regulations.

[20] The jury was not asked to, and did not, enumerate the ways in which it believed MMS breached the Billing Services

Construing the evidence and all permissible inferences most strongly in favor of MBI, a reasonable jury could reach the conclusion it did. Accordingly, MMS's motion for judgment as a matter of law on this issue, notwithstanding the verdict, is denied.

B. Reverse the Award of $289,000.

The jury awarded $289,000 in damages against the defendants for fraudulently inducing MBI to retract its October 15, 1993 termination of the Billing Services Agreement. MMS argues there is no evidence upon which a reasonable jury could conclude MBI suffered damages for fraudulent inducement, and asks the Court to enter judgment in its favor as a matter of law on this claim, notwithstanding the verdict. Again, MMS explicitly does not seek a new trial if this request is denied.

MMS asserts it is entitled to judgment as a matter of law on this claim because the jury verdict reflects an improper award of contract damages in the guise of a tort award. MMS

Agreement. Since MBI claimed the Billing Services Agreement was breached by, among other things, MMS's inadequate billing practices, the jury reasonably could have concluded that MBI was injured to the extent it was required to expend monies to "rebill" some of the same procedures MMS was obligated to properly bill under the parties' agreement. The fact that MMS vigorously defended its billing practices and even credibly attacked MBI's version of what constitutes proper billing practices does not render the jury award irrational. This is especially so in light of the additional revenue which MBI's rebilling generated.

justifies this contention with two separate points. First, MMS asserts MBI offered no evidence at trial upon which an award of tort damages could be based. MMS argues that, while MBI argued it was fraudulently induced to continue in a relationship with MMS, it proffered no evidence that a harm, separate and apartment from MBI's contract claims, flowed from that alleged fraud. Second, MMS notes that the $289,000 in damages was precisely the amount MBI requested as damages for breach of contract attributable to rejected claims in the recoding project; MMS posits that the jury simply borrowed this number because it had no other evidence from which it could calculate an award on this cause of action. MMS argues that these facts show that the jury improperly awarded "contract" damages for the tort of fraudulent inducement and that the judgment must therefore be set aside.

Addressing the second point first, the identity between the number requested for the recoding project and the fraud award is not sufficient to justify an order vacating that award. The Court and the parties were all aware that the potential for confusion existed in this case: the jury participated in six weeks of trial in which it heard often complex testimony regarding numerous claims and counterclaims relating to a series of agreements and transactions spanning a number of years. To guard against any confusion, and to test the jury's verdict, the Court, with the approval of the parties, put a series of questions to the jury. Those questions, while not seeking detailed explanations of the jury's decision-making processes, were designed to highlight and explore the primary areas of dispute. Despite its relative insignificance from a dollar standpoint, one of the most hotly contested issues at trial was the validity of the recoding project and damages

claimed in connection with that project. Indeed, days of testimony, including expert testimony, focused solely on this issue.[21] In order to determine whether and to what extent the jury awarded damages for the recoding project, the jury was asked to identify which portion of its contract damages constituted recoding-related awards, and it did so -- making clear it awarded $29,000, and no more, in connection with that project.

In the face of those clear statements from the jury, the Court is disinclined to assume the jury both answered those questions in a misleading fashion and ignored the Court's instructions regarding the difference between contract damages and fraud damages when it did so.[22] The $289,000 figure could have represented a negotiated figure among the jurors, or even a convenient number to use to represent what the jury believed to be a fair figure in light of all the evidence. That the jury may have first heard that figure in another context does not, standing alone, make its use in this context improper or irrational.

MMS's first objection to this verdict is of greater concern, although, on balance, it cannot justify the judgment MMS now seeks. As noted, MMS contends that, even if MBI was fraudulently induced to retract its termination of the

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[21] The jury could not have failed to recognize the importance of this dispute.

[22] Among other things, the Court emphasized to the jury that "any damages you award on [the fraud] claim must proximately flow from the fraud and not from a breach of contract, if any, that you find occurred." (Trial transcript at 4697).

Billing Services Agreement in October of 1993, MBI suffered no damage as a proximate result of that fraud. MMS contends that, while MBI claimed it was the victim of various breaches of the Billing Services Agreement between October of 1993 and August 1, 1994, those damages are only properly recoverable as contract damages -- damages which the jury, in fact, awarded to MBI. MMS asserts that MBI offered no evidence of "non-contract" harm.[23]

MBI responds by asserting that it offered evidence that it suffered as much as $700,000 in damages as a result of MMS's fraud. MBI points out that one of the misstatements it claims induced it to continue its relationship with MMS was MMS's promise that it would use a third-party, Arthur Andersen & Co., to calculate the volume bonus and guaranteed revenue shortfall amounts due under the Billing Services Agreement. This statement implied a willingness to resort to an objective, honest method for calculating the parties' rights and obligations. MBI claims that MMS made this statement, however, at a time that MMS was engaged in a scheme designed to manipulate the relative value units (RVU's) given to Arthur Andersen for purposes of making its calculations. MBI claims that, because it was virtually

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[23] MBI did offer substantial evidence regarding alleged harm to RS&J (damages to reputation, lost business opportunities, etc.), which RS&J claimed flowed both from MMS's fraud and from MMS's substandard performance under the Billing Services Agreement. Because the Court rejected RS&J's fraudulent inducement claim, however, and the jury rejected RS&J's contract claim, this evidence is irrelevant to the issues now before the Court.

impossible to arrive at appropriate calculations in the face of MMS's largely untraceable and unreversible RVU manipulation, MBI suffered harm which is distinct from the damages it suffered by virtue of a breach of the Billing Services Agreement. Simply, MBI insists that any contract damages it received could not and do not fully take into account its injuries flowing from MMS's alleged "RVU scam.

MMS, in turn, characterizes this alleged harm as a subset of MBI's contract damages. MMS claims these damages were recoverable, if at all, only through MBI's contract claims.

MMS is correct that it is not a tort under Ohio law to breach a contract, and that the mere assertion of alternative theories of recovery does not justify damages in addition to those recoverable under a contract, absent evidence of some distinct injury. These truisms do not mean, however, that whenever a party pleads and proves a breach of contract, all harms, including those flowing from having been induced to enter into that contract in the first instance, collapse into a damage award under the contract. While the line between contract and tort damages may not be an easy one to draw where the fraud claim is premised on the act of contracting itself, the Court is not prepared to say that the jury is always ill-equipped to draw it.

Here, the jury received detailed instructions, approved by MMS, regarding the distinction between fraud and contract damages and the obligation to avoid any overlap between the two. MBI proffered evidence that: (1) MMS fraudulently manipulated the RVU's used to define the parties' contract

positions, in a way that was neither fully traceable nor fully reversible; and (2) MBI would not have retracted its 1993 termination of the Billing Services Agreement had it known of this manipulation and of its potential effect on MBI's ultimate status under that agreement. The jury rationally could have concluded that damages flowing from the autumn of 1993 RVU manipulation were damages attributable to fraud, rather than to any breach of contract; the Court is not prepared to disregard that conclusion and, in so doing, assume the jury disregarded its instructions.

In sum, the Court finds that there existed evidence sufficient to create an issue of fact for the jury on this claim, and that a jury could properly find for MBI on this claim when applying the correct legal standard. Construing the evidence and all permissible inferences most strongly in favor of MMS, a reasonable jury could reach the conclusion it did. Accordingly, MMS's motion for judgment as a matter of law on this issue, notwithstanding the verdict, is denied.

C. Reverse the Award of $923,000.

In addition to the $29,000 "recoding project" damages awarded by the jury in connection with MBI's breach of contract claim, the jury also awarded $923,000 in additional damages (for a total of $952,000). As to the $923,000 portion of this award, MMS reasserts its position, taken during trial, that MBI's claim cannot be sustained as a matter of law, by virtue of the Ohio statute of frauds. MMS concludes that the Court should grant MMS judgment as a matter of law.

At the final charging conference, MMS argued that, as a matter of law, it could not be deemed to have breached any contract because MBI had "orally revived a six year agreement it had already validly canceled in writing." Defendants' memo in support of post-judgment relief at 4 n. 1; see trial transcript at 4437-41. The Court overruled this argument as unsupported by the evidence presented at trial (the very evidence which the Court felt justified MMS's amendment of its own counterclaim), and charged the jury on MBI's breach of contract claim.

In its post-judgment motion, MMS reasserts its position regarding the effect of the statute of frauds on MBI's breach of contract claim. In its memorandum in support, however, MMS offered no argument in support of its position. This is likely so because the jury's determination that the contract was not terminated until 1994 makes this argument untenable. Thus, the jury did not conclude, as MMS contends, that the written agreement between the parties was terminated in 1993 and that the parties proceeded thereafter pursuant to an oral agreement between them. The jury concluded, instead, that MMS fraudulently induced MBI into retracting its attempted termination of the agreement in 1993, leaving the written contracts in place until August 1, 1994. The evidence submitted at trial was wholly consistent with this conclusion. At all times prior to August 1, 1994, both parties treated their relationship as if it was governed by the terms set forth in the Billing Services Agreement and the Asset Purchasing Agreement, precisely as expressed in those documents. There was no evidence submitted from which one could conclude that either party thought their rights and responsibilities vis-a-vis the other were governed by some unstated oral understanding after August 1993. Indeed, the

concept of an oral contract, which first appeared in MMS's trial brief on the eve of trial, depended entirely upon MMS's contention that the contract was terminated in October of 1993 -- a contention the jury squarely rejected.

For all these reasons, the Court deems defendants' position on the statute of frauds unestablished and denies the requested relief. The Court declines to modify its earlier ruling on this matter.

D. Amend the Award of $2,093,000 to Include Pre-Judgment Interest.

MMS argues that the Court should amend the jury award of $2,093,000 in contract damages to include pre-judgment interest, running from the date of contract termination (August 1, 1994) through the date of judgment entry.

Given that the Court has granted MBI's motion for judgment notwithstanding the verdict as to $1,868,000 of this $2,093,000, MMS's motion is largely moot. Nonetheless, the Court rules on MMS's motion by addressing below: (1) whether MMS would be entitled to pre-judgment interest on the $1,868,000, absent this Court's entry of judgment notwithstanding the verdict; and (2) whether prejudgment interest is appropriate as to the remaining $225,000 of contract damages awarded in favor of MMS.

1. Pre-judgment Interest on the Award of $1,868,900.

Regarding whether MMS would be entitled to pre-judgment interest on the $1,868,000 absent the Court's entry

of judgment notwithstanding the verdict, MBI raises three arguments. First, MBI asserts that MMS's discovery failures "delayed the commencement of trial by almost exactly one year." Memo in opp. at 14. MBI thus argues that an award of pre-judgment interest would inappropriately reward MMS for its own discovery misconduct. Second, MBI notes that MMS obtained significant tax benefits when, on its 1994 federal tax return, it deducted $1,868,357 as the unamortized portion of the purchase price of the covenant not to compete. Thus, MBI argues that granting pre-judgment interest on the $1,868,000 award "would compensate MMS for a deprivation it never truly suffered and would constitute a double recovery." Memo in opp. at 16. Finally, MBI asserts that even under MMS's own theory of the case, the $1,868,000 only became due to MMS in monthly installments through September of 1998, not all at once on the August 1, 1994 date of the contract breach. Thus, MBI argues that the Court must undertake a present value analysis, and award pre-judgment interest only on that portion of the $1,868,000 that became due and payable before the Court's November 27, 1996 entry of judgment.

The Court finds MBI's first argument well-taken. The revelation of MMS's discovery abuses occurred just before trial was scheduled to occur on November 1, 1995. The Court postponed the trial to allow MBI to obtain discovery improperly withheld by MMS, and the trial eventually went forward on October 16, 1996. This period of delay is entirely attributable to MMS and its former counsel. Equity demands that MMS not profit from the delay it caused; thus, the Court holds that MMS would not be entitled to pre-judgment interest on its contract damages for the period of delay. If the Court of Appeals reverses this Court's judgment notwithstanding the

verdict regarding MMS's damage award of $1,868,000, this Court would rule that MMS is entitled to pre-judgment interest on that amount only during: (1) the period of August 1, 1994 (the date of contract breach) through November 1, 1995 (the date trial was originally scheduled); and (2) October 16, 1996 (the date the trial finally began) through November 27, 1996 (the date of entry of judgment). The Court would rule that MMS is not entitled to pre-judgment interest on the $1,868,000 during the interim period of November 2, 1995 through October 15, 1996, inclusive.[24]

The Court finds MBI's second argument is not well-taken. That MMS received tax benefits from deducting the $1,868,000 on its federal income tax returns may go to the issue of whether the $1,868,000 amount itself is correct -- to the extent MMS obtained a tax benefit, its damages should perhaps be offset. But there is no nexus between whether MMS received any tax benefit from deducting the $1,868,000 and whether MMS is entitled to pre-judgment interest on that amount.

Finally, for similar reasons, the Court also finds MBI's third argument is not well-taken. At best, MBI's

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[24] The Court's decision not to award pre-judgment interest to MMS during the interim period does not constitute a duplicate sanction, as MMS contends. The Court's sanction award against MMS partially reimburses MBI for its costs in obtaining discovery MMS improperly denied it, for having to engage in additional discovery because of MMS's alteration of documents, and for having to bring the matter to the Court's attention. The Court did not factor into the sanction the cost of the delay caused by MMS.

suggested present-value analysis goes to the proper amount of the damages award, not to whether MMS is entitled to pre-judgment interest on that amount. MBI has had the use of the entire $1,868,000 since the time it received it; if that amount is properly awarded as contract damages to MMS, MBI should pay pre-judgment interest on the entire amount, not on some annuitized value.

2. Pre-judgment Interest on the Award of $225,000.

The Court left undisturbed the jury's award to MMS of $225,000 in contract damages. Thus, MMS's motion for pre-judgment interest is not moot as to this amount. MBI essentially argues that an award of pre-judgment interest on this amount would be inappropriate because the award itself was inappropriate. The Court, however, for the reasons stated above, has denied MBI's motion for judgment as a matter of law, notwithstanding the verdict, as to the award of $225,000 in contract damages. Thus, the Court finds that an award of pre-judgment interest on this amount is appropriate. For the reasons discussed above, however, the Court finds that MMS is not entitled to collect pre-judgment interest during the period of delay it caused between the time the contract was breached and the time this action finally went to trial. Accordingly, the Court grants MMS's motion for pre-judgment interest on the contract damage award of $225,000 only during: (1) the period of August 1, 1994 (the date of contract breach) through November 1, 1995 (the date trial was originally scheduled); and (2) October 16, 1996 (the date the trial finally began) through November 27, 1996 (the date of entry of judgment). MMS is not entitled to pre-judgment interest on the $225,000 during the interim period of November 2, 1995 through October 15, 1996, inclusive.

E. Amend the Judgment Entry Regarding the Bifurcated Claims.

As noted, the Court concluded its entry of judgment with the statement that "[a]ll other claims asserted in this matter are dismissed" MMS notes that this statement applied even to its "collection-related" counterclaims of alter ego liability and fraudulent conveyance, asserted against Drs. Reich and Seidelmann individually, which the Court had bifurcated.

MBI does not dispute that the Court's (inadvertent) dismissal of MMS's alter ego liability and fraudulent conveyance counterclaim must be undone. Accordingly, the Court will issue an amended entry of judgment making clear that these claims remain pending.

MMS also requests that the Court enter final judgment on all claims except for the "collection-related" counterclaims, so that the parties can immediately execute the judgment and take any appeals. MBI does not dispute that the only unresolved claims remaining in this case are essentially collection-related, and that the parties should be free to take immediate appeals from the Court's entry of judgment.

The Court finds that there is no just reason for delay in entering judgment on the parties' substantive claims, such that those claims become immediately ripe for appeal, and the Court will enter an amended judgment accordingly. The Court's determinations are, for all practical purposes, a final adjudication on the merits of all substantive claims in this case. The only remaining claims are asserted by MMS for the purpose of collecting upon the judgment. Given that the

Court's judgment now allows MMS to seek collection of only $225,000, not $2,093,000, it is far less likely MMS will actually need to prosecute its collection claims. Moreover, MMS has suggested it will only prosecute its collection claims if MBI seeks to defeat satisfaction of the judgment. Thus, the Court grants MMS's request and hereby certifies that there is no just reason for delay in entering judgment on those claims already decided, and the Court will direct the entry of a final order of judgment, accordingly.

V. Plaintiffs' Motion for An Award of Fees and Costs.

Earlier, this Court imposed sanctions jointly upon MMS and the law firm then representing it, Hahn Loeser & Parks ("HLP"). Specifically, the Court "awarded as sanctions to MBI [reimbursement of] all fees and costs associated with the discovery and investigation of, and litigation concerning the alteration of and/or failure to produce, the 1994 financial statements." Further, the Court awarded as sanctions to MBI reimbursement of "the fees and costs associated with the second depositions of certain MMS employees and former employees, made necessary by MMS's withholding of responsive documents." Medical Billing, Inc. v. Medical Mgt. Sciences, Inc. 1996 WL 219657 at *7 (N.D. Ohio Apr. 26, 1996); see also Medical Billing Inc. v. Medical Mgt. Sciences. Inc., 169 F.R.D. 325 (N.D. Ohio 1996) (denying motion to amend). To ascertain the proper amount of these sanctions, the Court ordered counsel for MBI, Donovan Leisure Newton & Irvine ("DLNI"), to submit a statement of relevant fees and costs charged to MBI, and further ordered HLP to object, if appropriate, to the amounts claimed.

DLNI has submitted its statement of fees and costs, requesting $209,719.27 on behalf of MBI. HLP objects to this amount, arguing that MBI is entitled to recover only $83,886.02[25] For the reasons stated below, the Court grants plaintiffs' motion only in part, and awards $83,886.02 as sanctions.

HLP objects to DLNI's statement of fees and costs on several grounds. First, HLP asserts that DLNI's statement includes attorney time that is duplicative or unreasonable. Specifically, HLP asserts that: (1) some of the time sheet entries by DLNI attorneys are so cryptic that it is impossible to ensure the attorneys' time was validly spent pursuing the discovery for which the Court ordered reimbursement; and (2) DLNI used several attorneys for certain tasks when one would have been adequate. Second, HLP asserts that the hourly rate charged by certain DLNI attorneys ($395 for Mr. Lustenberger and $300 for Mr. Johnson) is excessive. Third, HLP argues that because DLNI charges for its attorney time in increments of quarter-hours instead of tenths-of-an-hour, DLNI's fee request is overstated. Fourth, HLP asserts that some of the costs listed by DLNI are excessive. And fifth, HLP asserts that a significant portion of the fees and costs included in DLNI's statement are simply not within the scope of the Court's April 26, 1996 order awarding sanctions

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[25] HLP's objections are those of MMS as well, as MMS did not file a separate memorandum in opposition and, instead, simply informed the Court of its concurrence in HLP's arguments. In addition to their objections regarding the amount requested, HLP and MMS also preserve their right to appeal the award of sanctions.

("Sanction Order") -- that is, many of the fees and costs listed by DLNI are not "fees and costs associated with the discovery and investigation of, and litigation concerning the alteration of and/or failure to produce, the 1994 financial statements," nor are they "fees and costs associated with the second depositions of certain MMS employees and former employees, made necessary by MMS's withholding of responsive documents." The Court finds itself in agreement with HLP's arguments, to varying degrees. For example, the Court agrees that the hourly rate charged by some, but not all, of the DLNI attorneys is excessive; that some, but not all, of the costs identified by DLNI are not properly reimbursable; that on certain occasions, DLNI employed more than the necessary number of attorneys; and that some of the fees and costs included in DLNI's statement are not within the scope of the Court's Sanctions Order.

Ordinarily, the Court would undertake a "lodestar calculation" to determine the appropriate amount of costs and fees that HLP and MMS should pay as a sanction in this case. "The ordinary process for determining an award of fees involves calculation of the so-called 'lodestar' figure. . . . This approach is appropriate in the context of expense awards under Rule 37." Securities & Exchange Comm'n v. Thrasher, 1995 WL 552704 at *2 (S.D.N.Y. Sept. 18, 1995); see also Bodenhamer Bldg. Corp. v. Architectural Research Corp., 989 F.2d 213, 221 (6th Cir. 1993) (directing district court, on remand, to undertake lodestar calculation to determine proper amount of Rule 11 sanction). The Court concludes, however, that it need not perform such an analysis in this case because it finds that: (1) the total amount listed by DLNI is excessive in an absolute sense; and (2) the amount

that HLP concedes is reasonable is an amount sufficient to sanction HLP and MMS.

The Court remains strongly of the opinion that it is fair to impose upon HLP and MMS the sanction of reimbursing MBI for all of the "fees and costs assodated with the discovery and investigation of, and litigation concerning the alteration of and/or failure to produce, the 1994 financial statements" and the "fees and costs associated with the second depositions of certain MMS employees and former employees, made necessary by MMS's withholding of responsive documents." The Court's earlier conclusion that the conduct of HLP and MMS was a serious abuse of the Federal Rules of Civil Procedure and the Code of Professional Responsibility has not changed. However, the Court also believes that a sanction even approaching the amount requested by DLNI is so high that it is an excessive penalty against HLP and MMS for their actions in this case. Further, the Court finds that, in the circumstances of this case, a sanction of $83,886.02 is sufficient as a penalty against HLP and MMS. The Court is confident that a sanction of this magnitude will: (1) sufficiently punish HLP and MMS; and (2) more broadly serve as a sufficient general and specific deterrent against similar behavior.

Because HLP concedes that $83,886.02 of the costs and fees contained in DLNI's fee statements are reasonable, the Court imposes a sanction in this amount, for the reasons stated in its April 26, 1996 and July 22, 1996 Orders. Although it appears MBI might otherwise be entitled to a greater amount, if measured by undertaking a lodestar calculation based on DLNI's fee statements, the Court concludes that any amount greater than the amount awarded

here would be excessive punishment for the sanctionable actions in this case.

Finally, the Court notes that, during the trial of this matter, it was presented with additional evidence of the conduct described in the Court's Sanction Order. There is no reason to recount this evidence here, but the Court believes it is important to state that this evidence only served to reaffirm the Court's conclusion that its Sanctions Order is appropriate and well-grounded. Further, the Court adds that it has carefully reassessed whether it is appropriate to impose the sanctions in this case equally against both HLP and MMS, such that each is liable to MBI for half the amount of sanctions (absent some agreement between HLP and MMS otherwise). After much consideration, the Court concludes that it is appropriate to impose the sanctions equally. Although HLP and MMS are culpable for different sorts of behavior and under somewhat different standards, the Court concludes their culpability is roughly equal.[26] Accordingly, the Court orders that HLP and MMS are jointly liable to MBI for payment of $83,886.02, as a sanction for the discovery abuses that occurred in this case.

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[26] For instance, while it became apparent at trial that the alteration of MMS' financial statements was conceived and directed by MMS personnel, it was HLP which, with after-acquired knowledge of this fact, provided misleading discovery responses to MBI and counsel, and knowingly misrepresented the facts to the Court.

IT IS SO ORDERED.

/s/_____
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed July 7, 2000]

Nos. 98-3561/3564

MEDICAL BILLING, INC.,	)
Plaintiff-Appellee,	)
	)
REICH, SEIDELMANN & JANICKI,	)
Plaintiff-Appellee/ Cross-Appellant,	)
	)
v.	)
	)
MEDICAL MANAGEMENT SCIENCES, INC.; JAMES F. THACKER; WILLIAM J. DEZONIA, JR.,	)
Defendants-Appellants/ Cross-Appellees.	)

ORDER

BEFORE: MERRITT and SILER, Circuit Judges; and BECKWITH,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active** judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____

Leonard Green, Clerk

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* Hon. Sandra S. Beckwith, United States District Judge for the Southern District of Ohio, sitting by designation.

** Judge Moore recused herself from participation in this ruling.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 538
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

LEONARD GREEN
Clerk

TELEPHONE
(513) 564-7000

May 19, 2000

Christopher P. Johnson
Caryn G. Mazin
Robin G. Weaver
Daniel L. Brockett

Re: Case Nos. 98-3561/3564
Medical Billing, Inc., et al. v. Medical Management Sciences, Inc., et al.
District Court No. 94-01567

Dear Counsel:

Enclosed are corrected copies of pages from the decision originally sent to you May 8, 2000. Please make corrections in your publication version as indicated on page 10, line 3 and page 15, lines 2 and 3 under Section III. A corrected copy of the judgment is also enclosed.

Thank you for your cooperation in this matter.

Yours very truly,

Leonard Green, Clerk

By /s/_____
(Mrs.) Linda K. Martin
Deputy Clerk

Enclosures

cc: Honorable Kathleen McDonald O'Malley
Geri M. Smith, Clerk
Lexis Nexis
West Publishing Company
Commerce Clearing House, Inc.
Bureau of National Affairs
M. Lee Publishers LLC
Tax Analysts
Ohio Lawyers Weekly

Fold-out

MMS could not, as a matter of law, prove a breach of the Asset Purchase Agreement by MBI. The district court's decision on MBI's Rule 50(b) motion is ~~VACATED~~, in part, and, on remand, the district court is instructed to enter judgment, consistent with this opinion, in favor of MBI with respect to MMS's claim for breach of the Asset Purchase Agreement.

AFFIRMED for reasons other than those given by the district court,

B. MBI's Fraudulent Inducement Claim

The jury found that MMS's principals, Thacker and DeZonia, fraudulently induced MBI to withdraw its first notice of termination by promising to be bound by Arthur Andersen's calculations of RVU's for purposes of establishing the amount of future Collection Bonus payments. After the trial, MMS moved, pursuant to Rule 50(b), for judgment as a matter of law with regard to the fraudulent inducement claim arguing that MBI failed to introduce evidence of damages arising from the alleged fraud that were distinct from its damages resulting from the breach of the Billing Services Agreement. The district court denied MMS's Rule 50(b) motion with regard to that claim.

MBI based its claim for fraudulent inducement upon the promise by MMS to abide by Arthur Andersen's calculation of RVUs for purposes of determining the Collection Bonus to which MBI was entitled. MBI presented evidence at trial from which the jury could have found that MMS was already manipulating the data provided to Arthur Andersen for the purpose of minimizing the Collection Bonus when that promise was made. On the basis of that evidence, the jury could well have concluded that MMS omitted to tell MBI that it intended to provide altered or inaccurate data to Arthur Andersen, even though that fact would have been material to MBI in considering whether to exercise its right under the Billing Services Agreement to terminate that agreement. To the extent that MBI was able to adduce evidence to show that it suffered damages as a result of that omission, apart from the damages it suffered as a result of MMS's breach of the Billing

Fold-out

C. RS&J's Claim for Breach of Contract

RS&J asserted a claim for breach of the Billing Services Agreement against MMS. The basis for the claim was that RS&J was an intended third-party beneficiary to that agreement and that RS&J had suffered a loss as a result of the breach of the agreement by MMS. The district court submitted the question of whether RS&J was an intended third-party beneficiary of the Billing Services Agreement to the jury, which found that it was not. The district court denied RS&J's Rule 50(b) motion with respect to its claim for breach of the Billing Services Agreement.

RS&J contends that the district court should have granted it a new trial on its breach of contract claim because the jury's finding that RS&J was not an intended third-party beneficiary of the Billing Services Agreement was without support in the record and contrary to law. We note, however, that the district court did not merely ask the jury whether RS&J was an intended third-party beneficiary, but it also asked whether RS&J suffered any damages from the breach of the Billing Services Agreement if it was an intended third-party beneficiary. The jury gave a negative response to that question. Accordingly, to the extent that the jury's finding concerning RS&J's damages finds support in the record, RS&J was not prejudiced, even if the jury incorrectly concluded that RS&J was not an intended third-party beneficiary of the Billing Services Agreement.[5]

Because we find support in the record for the jury's finding that RS&J did not suffer damages as a result of MMS's breach of the Billing Services Agreement, we conclude that the district court did not err in denying RS&J's Rule 50(b) motion with regard to its claim as an intended third-party

[5]It is, perhaps, noteworthy that RS&J did not object to the form of the interrogatories to the jury.

beneficiary of the Billing Services Agreement. The district court's decision in that regard is **AFFIRMED**.

III

For these reasons, the district court's decision on MBI's Rule 50(b) motion is ~~**VACATED**, in part, and, on remand, the district court is instructed to enter judgment~~ in favor of MBI with respect to MMS's claim for breach of the Asset Purchase Agreement. The district court's decision denying MMS's Rule 50(b) motion with respect to MBI's claim for fraudulent inducement is **REVERSED** with instructions to enter judgment in favor of MMS with respect to that claim. The denial of RS&J's Rule 50(b) motion with regard to its claim as an intended third-party beneficiary of the Billing Services Agreement is **AFFIRMED**.

AFFIRMED for reasons other than those given by the district court, and, on remand, the district court is instructed to enter judgment, consistent with this opinion,